87-1695

No. _____

Supreme Court, U.S.
FILED
APR 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

---

GREAT LAKES DREDGE & DOCK COMPANY,
*Petitioner,*

vs.

CHEVRON TRANSPORT CORPORATION,
CHERVON SHIPPING COMPANY, and
VIVIAN MARIE SELF, ETC.,
*Respondent.*

---

**PETITION OF GREAT LAKES DREDGE & DOCK COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

---

COURTNEY WILDER STANTON
136 E. Bay Street, Suite 301
Jacksville, Florida 32202
(904) 355-5304
*Counsel of Record*

DEWEY R. VILLAREAL, JR.
P.O. Box 1438
Tampa, Florida 33601
(813) 228-7411
*Counsel for Petitioner*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

## QUESTION PRESENTED FOR REVIEW

Whether the 1874 decision of this Court in *The Pennsylvania,* 86 U.S. 125, pursuant to which a unique presumption not of negligence but of ultimate causation attaches to a finding of statutory fault, should be overruled because it conflicts in principle with concepts adopted by this Court in recent decisions, is no longer necessary, and has become an actual encumbrance to the general maritime law.

## LIST OF PARTIES

The parties to the proceedings below were the petitioner, Great Lakes Dredge & Dock Company, and the respondents, Chevron Transport Corporation, Chevron Shipping Company and Vivian Marie Self (now Mrs. Daniel Stalnaker). Companies related to the parties are Great Lakes International, Inc.; Chevron U.S.A.; Intel, Inc.; Chevron, Inc. f/k/a Standard Oil of California.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED FOR REVIEW | i |
| LIST OF PARTIES | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | iv |
| OPINION BELOW | 1 |
| JURISDICTION | 2 |
| REGULATORY PROVISION INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASON FOR GRANTING THE WRIT | 4 |
| THE CONTINUING VALIDITY OF THE *PENNSYLVANIA* RULE IS AN IMPORTANT MATTER WHICH SHOULD BE ADDRESSED, AS THE RULE CONFLICTS WITH THE THRUST AND THE PRINCIPLES ADOPTED BY THIS COURT IN *RELIABLE TRANSFER*, IS NO LONGER NECESSARY, AND HAS BECOME AN ENCUMBRANCE | |
| CONCLUSION | 13 |
| APPENDIX | 1a |

## TABLE OF AUTHORITIES


| CASES: | Page |
|---|---|
| *Candies Towing Co. v. M/V B & C Esserman*, 673 F.2d 91, 95 (5th Cir. 1982) | 5 |
| *Capt Mark v. Sea Fever Corp.*, 692 F.2d 163, 167 (1st Cir. 1982) | 5 |
| *Cole v. Sabine Towing & Transp. Co.*, 432 F.Supp. 144, 148 (S.D. Ala. 1977) | 8 |
| *Compania de Maderas, Etc. v. The Queenston Heights*, 229 F.2d 120 (5th Cir. 1955), *cert. denied*, 350 U.S. at 824 (1955) | 9 |
| *Crown Zellerbach Corp. v. Williamette-Western Corp.*, 519 F.2d 1327, 1329 (9th Cir. 1975) | 10 |
| *Davis v. Superior Oil Co.*, 510 F.Supp. 1167, 1165 n.1, 1166 (E.D. La. 1951) | 5 |
| *Director Gen'l of India Supply Mission v. S/S Maru*, 459 F.2d 1370, 1375, *cert, denied*, 409 U.S. 1115 (1973) | 12 |
| *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) | 11 |
| *Fast v. Western Transp. Co.*, 604 P.2d 400 (Or. 1979) | 5 |
| *First Nat'l Bank of Chicago v. Material Serv. Corp.*, 544 F.2d 911, 914 (7th Cir. 1976) | 5 |
| *Gaspar v. United States*, 460 F.Supp. 656 (D.Mass. 1978) | 10 |
| *In re Gypsum Carrier*, 463 F.Supp. 1050, 1063 n.8 (S.D. Ga. 1979) | 7 |
| *Ishizaki Kisen Co. v. United States*, 510 F.2d 875, 880 (9th Cir. 1975) | 9 |
| *M/S Bremen v. Zapata Off Shore Co.*, 407 U.S. 1 (1972) | 11 |
| *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) | 11 |

## Table of Authorities Continued


| | Page |
|---|---|
| *National Bulk Carriers v. United States,* 183 F.2d 405 (2d Cir. 1950), *cert. denied,* 340 U.S. 865 (1950) | 8,9 |
| *Nehus v. Alaska Marine Towing, Inc.,* 519 F.Supp. 328 (W.D. Wash. 1981) | 10 |
| *People of State of Cal. v. Italia Motorship Ilico,* 534 F.2d 836, 840 (9th Cir. 1976) | 12 |
| *Puerto Rico v. S.S. Zoe Colocotroni,* 456 F.Supp. 1327 at 1333-36 (D.P.R. 1978), *modified,* 628 F.2d 652 (1st cir. 1980), *cert. denied,* 450 U.S. 912 (1981) | 10 |
| *Seaboard Tug & Barge, Inc. v. Rederi AB/Disa,* 213 F.2d 772 (1st Cir. 1954) | 8 |
| *Southern Pac. Transp. Co. v. Tug Captain Vick,* 443 F.Supp. 722, 732 n.1 (E.D.La. 1977) | 5,7 |
| *Tempest v. United States,* 404 F.2d 870 (4th Cir. 1968) | 8 |
| *The Choctaw,* 129 F.2d 618 (2d Cir. 1942) | 8 |
| *The Farmsum,* 574 F.2d 289, 297 (5th Cir. 1978) | 5 |
| *The Harrisburg,* 119 U.S. 199 (1886) | 11 |
| *The Pennsylvania,* 86 U.S. (19 Wall.) 125 (1874) | 4,5,12 |
| *The Plymouth,* 70 U.S. (3 Wall.) 20 (1866) | 11 |
| *The Princess Sophia,* 61 F.2d 339, 347 (9th Cir. 1932), *cert. denied,* 228 U.S. 604 (1933) | 5 |
| *The Schooner Catherine,* 58 U.S. 17 How. 170 (1855) | 11 |
| *The Steamship Pennsylvania v! Troop,* 86 U.S. 1(19 Wall.) 125 (1874) | 4,5,12 |
| *Union Oil Co. v. The San Jacinto,* 409 U.S. 140 (1972) | 11,12 |

## Table of Authorities Continued

Page

*United States v. Reliable Transfer co.*, 421 U.S. 397 (1975) ..... 11,12,13

MISCELLANEOUS

Bue, *Admiralty Law in the Fifth Circuit—A Compendium for Practitioners: II*, 5 Hous. Rev. 767, 789 (1968) ..... 9

Daly, *The Pennsylvania Rule: Charting a New Course for an Ancient Mariner*, 54 B.U.L. Rev. 78, 90-91 (1974) ..... 9

Goschka, *Goodbye to All That:—The Unlamented Demise of the Divided Damages Rule*, 8 J. Mar. L. & Com. 51, 66 (1976) ..... 6,11

Outhu, *The Pennsylvania Rule: 109 Years Out and Homeward Bound*, 19 Loy. L. Rev. 353, 381 (1983) ..... 10,12

Owen, *The Origins and Development of Marine Collision Law*, 51 Tulane L. Rev. 759, 803 at n.8 ..... 6,12

Pitts, *Admiralty's Pennsylvania Rule*, 24 So. Tex. L.J. 541 n.2 ..... 11

Sager, *Apportioning Maritime Collision Damages: Applying the Rule of Reliable Transfer*, 34 Wash. & Lee L. Rev. 1237, 1246-49, 1262 (1977) ..... 6,12

Tetley, *The Pennsylvania Rule, Etc.*, 13 J. Mar. L. & Comm. 127 (1982) ..... 5,8,12

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

---

**NO. 87**

---

GREAT LAKES DREDGE & DOCK COMPANY,
*Petitioner,*

vs.

CHEVRON TRANSPORT CORPORATION,
CHEVRON SHIPPING COMPANY, and
VIVIAN MARIE SELF, ETC.,
*Respondents.*

---

## PETITION OF GREAT LAKES DREDGE & DOCK COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

The Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on December 1, 1987.

### REFERENCE TO OPINIONS BELOW

The opinions below consist of the following (listed chronologically):

1. Opinion of September 27, 1982 of the United States Court of Appeals for the Eleventh Circuit. *Ebanks v. Great Lakes Dredge & Dock Co.*, 668 F.2d 716 (11th Cir. 1982).

2. Opinion dated July 12, 1985 and entered on July 15, 1985 by the United States District Court for the Middle District of Florida, Jacksonville Division. (Appendix Item 3)

3. Opinion of December 1, 1987 of the United States Court of Appeals for the Eleventh Circuit. *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, (11th Cir. 1987). (Appendix Item 1)

4. Order of January 6, 1988, denying suggestion of rehearing in banc. (Appendix Item 2)

## JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit sought to be reviewed in this case was entered on December 1, 1987. A timely Petition for Rehearing in banc was denied on January 6, 1988, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## REGULATORY PROVISION INVOLVED

*Code of Federal Regulation, Title 33,* (1974). *Pilot Rules for Inland Waters.§ 80.26.* When any pipeline or swinging dredge shall have given an approaching vessel or tow the signal that the channel is clear, the dredge shall straighten out within the cut for the passage of the vessel or tow.

## STATEMENT OF THE CASE

On February 5, 1975, the Dredge ALASKA, owned by Great Lakes Dredge & Dock Company, was working in a straight reach of the St. Johns River at Jacksonville, Florida, pursuant to a contract between

Great Lakes Dredge and the U. S. Army, Corps of Engineers, for the deepening of the Jacksonville Ship Channel. About noon, the ALASKA, which had been sweeping back-and-forth across the channel, had ceased dredging, and, in anticipation of the passage inbound of the ROBERT WATT MILLER, a Liberian-flag tanker, had been swung over "into the corner" toward the right hand descending side of the river, with its bow-mounted cutter head some twenty-six degrees away from the axis of the channel. Since the dredge was positioned with her cutter end downstream, this placed its starboard side toward the near bank of The river and its port side to traffic in the channel.

The tanker, owned by Chevron Transport Corporation and operated by Chevron Shipping Company, negotiated a turn about one mile downriver and steadied on her course up the next straight away—the one in which the stationary ALASKA was positioned awaiting the tanker's passage. Moments before impact, the tanker's bow swung to its left past the centerline of the channel and the collision with the port side of the dredge followed.

Ten dredgemen were affected by the incident, two being killed and eight receiving injuries. With the exception of the claim on account of Danny Joe Self, deceased, all claims for loss-of-life and bodily injury have been settled.

An official investigation to determine, among other things, the cause or causes of the collision was undertaken by the United States Coast Guard, which activity did not result in the dredge interests' being cited for any navigational violation. A judgment entered upon jury verdicts following a first trial was

reversed. *Ebanks v. Great Lakes Dredge & Dock Company.* 688 F.2d 716 (1983). Collision causation was revisited upon the occasion of the second trial. *Complaint of Chevron Transport Corporation,* 613 F.Supp. 1428 (M.D. Fla. 1985). On this occasion, the trial court found a number of bases for faulting the navigation of the moving tanker for causing the collision. At the same time, based upon the trial court's determination of the interpretation to be given a regulation of the Department of Transportation, 80 C.F.R. §26(c), the trial court applied the causative presumption announced by this Court's decision in *The Steamship Pennsylvania v. Troop,* 86 U.S. (19 Wall.) 125 (1874), and concluded that the stationary Dredge ALASKA, having been found unable to carry the doctrinal burden of showing that the court-determined violation of 80 C.F.R. §26 could not have contributed to cause the collision, was to be held partially at fault with respect to the cause of the collision.

The continuing validity of the so-called *Pennsylvania* Rule was raised in the court below, which held "the rule set out in *The Pennsylvania* is still viable. . . ."

## REASON FOR GRANTING THE WRIT

THE CONTINUING VALIDITY OF THE *PENNSYLVANIA* RULE IS AN IMPORTANT MATTER WHICH SHOULD BE ADDRESSED, AS THE RULE CONFLICTS WITH THE THRUST AND THE PRINCIPLES ADOPTED BY THIS COURT IN *RELIABLE TRANSFER,* IS NO LONGER NECESSARY, AND HAS BECOME AN ENCUMBRANCE

The decisionally formulated *Pennsylvania* Rule entered the general maritime law thorough this Court's decision in *The Steamship Pennsylvania v. Troop,* 86 U.S. 125 (1874); frequently cited simply as *"The Pennsylvania".* Under this rule, if at the time of a collision or similar incident a ship was in actual violation of a statutory rule—even if only a comparatively minor violation—a burden is placed upon that ship of showing not merely that its fault might not have been one of the causes, or that it probably was not, but that it could not have been. *Ibid.* at 136.

The causative presumption which the *Pennsylvania* Rule effects has been characterized variously as "awesome", *Southern Pac. Transp. Co. v. Tug Capt. Vick,* 443 F.Supp. 722, 732 n.1 (E.D.La. 1977), "drastic", *Capt. Mark v. Sea Fever Corp.,* 692 F.2d 163, 167 (1st cir. 1982), "extraordinary and unusual", *ibid.,* "extremely difficult", *The Princess Sophia,* 61 F.2d 339, 347 (9th Cir. 1932), *cert. denied,* 228 U.S. 604 (1933), "harsh", *The Farmsum,* 574 F.2d 289, 297 (5th Cir. 1978), "heavy", 662 F.2d 1044, 1052 (5th Cir. 1981), "inflexible", *Davis v. Superior Oil Co.,* 510 F.Supp. 1167, 1165 n.1, 1166 (E.D. La. 1981), "severe", *Fast v. Western Transp. Co.,* 604 P.2d 400 (Or. 1979); "strict", *First Nat'l Bank of Chicago v. Matl'l Serv. Co.,* 544 F.2d 911, 914 (7t Cir. 1976), and "strenous", *Candies Towing Co. v. M/V B & C Esserman,* 673 F.2d 91, 95 (5th Cir. 1982). And at least one scholarly analysis has reached back to 1869 to question the rationale on which originally it was based. Tetley, *The "Pennsylvania" Rule, Etc.,* 13 J.Mar.L. & Comm. 127, 130-32 (1982).

While Professor Tetley may be unique in asking whether *The Pennsylvania* was correctly decided, he

has been joined in questioning the continued validity of its rule by some of the finest minds in American maritime law.

> Nevertheless, the rule of the Pennsylvania has, it is submitted, become unmanageable, primarily because the frequent harshness of its application in conjunction with the divided damages rule has led lower courts to devise their own differing interpretations of the rule. Now that the Supreme Court has decreed a new and flexible fault allocation formula, however, the evaluation of fault on the basis of all of the facts in each case should be left to the discretion of the courts. British courts and mariners have managed very well without the use of presumptions since 1911. In fact, this period of nonuse is longer than the period during which such presumptions were recognized. It is to be hoped that the Supreme Court or Congress will make a move toward further uniformity in both domestic and international law by overruling *The Pennsylvania.*

Owen, *The Origins and Development of Marine Collision Law,* 51 Tulane L. Rev. 759, 803 at n.8 (1977).

See also Sager, *Apportioning Maritime Collision Damages: Applying the Rule of Reliable Transfer,* 34 Wash. & Lee L. Rev. 1237, 1246-49, 1262 (1977); Goschka, *Goodbye to All that:—The Unlamented Demise of the Divided Damages Rule,* 8 J.Mar.L. & Comm. 51, 66 (1976): "Adoption of the new [proportional fault] rule will stop the judicial rule-bending and undermining of judicial integrity that accom-

panied the device known as the *Pennsylvania* Rule, with its inequitable burden of proof. . ." *Ibid.* at 66.

Trial judges—those called upon to make some sense of the resulting situation—have been unusually vocal in their condemnation of the *Pennsylvania* Rule.

> Like the divided damages rule, the *Pennsylvania* Rule was also created to induce care and vigilance on the waterways. If either has accomplished this design, it has done so through a crude and curious form of justice. The presumption of causation of the *Pennsylvania* Rule is unnecessary, inequitable, and ineffective in accomplishing its original design; like the divided damages rule, it should be abolished, or at least the burden of rebuttal must be reduced.

*Southern Pac. Transp. Co. v. Tug Capt. Vick,* 443 F.Supp. 722,732 n.1 (E.D. La. 1977).

> I add that even if the divided damages doctrine were still effective, I would probably decline, in the present factual setting, to follow the [*Pennsylvania*] rule creating so awesome a burden of rebuttal. The archaic doctrine of equal showing of damages in collision cases, which became extinct in *Reliable Transfer,* belongs to the same order of coelacanth.

*In re Gypsum Carrier,* 463 F.Supp. 1050, 1063 n.8 (S.D. Ga. 1979).

And the same highly experienced trial judge—who relied in this case upon the *Pennsylvania* Rule to shift to the stationary dredge the burden of showing that

her alignment in the channel "might not have been one of the causes, or that it probably was not, but that it could not have been a cause of collision"—in an earlier case characterized the process as a "drastic and unusual" presumption. *Cole v. Sabine Towing & Transp. Co.,* 432 F.Supp. 144, 148 (S.D. Ala. 1977).

As the criticism indicates, the *Pennsylvania* Rule has been surrounded with judicial buffers proposed to avoid its application in concrete case situations, all of which qualifiers, with the exception of the "precise and clearly defined duty" requirement, are to some degree at least in conflict with the clear language employed by this Court when it announced the rule a century ago.

> The *Pennsylvania* rule has been found repugnant in so many circumstances that it has been attenuated by the rule of 'reasonable probabilities', circumvented by shifts in the burden of proof, softened by the doctrine of 'passive action,' bypassed by the 'last clear change rule,' and ignored by the 'major-minor' fault rule.

Tetley, *The Pennsylvania Rule, Etc.,* 13 J.Mar.L. & Comm. at 140-44.

The First Circuit added the "reasonable probabilities" gloss, *Seaboard Tug & Barge, Inc. v. Rederi A.B. Disa,* 213 F.2d 772 (1st Cir. 1954), and the Fourth Circuit has formulated a "passive-action" exception, *Tempest v. United States,* 404 F.2d 870 (4th Cir. 1968). The Second Court articulated a conditions-vs-cause standard in *The Choctaw,* 129 F.2d 618 (2nd Cir. 1942), before practically ignoring the rule in *National Bulk Carriers v. United States,* 183 F.,2d 405 (2nd

Cir. 1950), *cert. denied,* 340 U.S. 865 (1950).[1] With notable foresight, a Ninth Circuit panel, in a pre-*Reliable Transfer* deliberation, concluded that the *Pennsylvania* Rule should not apply in a comparative-fault system "because of the difficulty in comparing the failure to discharge a frequently impossible burden with the fault of a different character of the other party to a collision. . . ." *Ishizaki Kisen Co. v. United States,* 510 F.2d 875 (9th Cir. 1975), a case where the allocation of damages was determined as a matter of choice of laws to be governed by other than the maritime law of the United States.

The Fifth Circuit contributed the decision in *Compania de Madaris de Carbarien v. The Queenston Heights,* 229 F.2d 120 (5th Cir. 1955), *cert. denied,* 350 U.S. at 824 (1955). This case has been criticized as representing a confusing blend of "reasonable probabilities", "cause-vs-condition", "clear fault", and a new "interest of judgment" exception. Daley, *The Pennsylvania Rule: Charting a New Course for an Ancient Mariner,* 54 B.U.L.Rev. 78, 90-91 (1974).

The net, cumulative result is what one commentator has referred to as "the obviously inconsistent pattern of interpretations of the *Pennsylvania* Rule by the various circuits. . . ." Buie, *Admiralty Law in the Fifth Circuit—A Compendium for Practitioners: II,* 5 Hous. Rev. 767, 789 (1968). Other commentators have not been so restrained:

---

[1] This Court in *Reliable Transfer* noted the Second Circuit's treatment of the *Pennsylvania* Rule in the *National Bulk Carriers* case. *Reliable Transfer, Inc. v. United States,* 421 U.S. at 404.

> . . . [T]he courts have vacillated in the enforcement of the Rule, even within a single decision; *Gaspar v. United States,* [460 F.Supp. 656 (D.Mass. 1978),] is the classic example. There, the courts strictly applied the Rule against the Government for its one 'pathetic' violation of the lighting regulations, yet applied the Rule leniently against the plaintiff in summarily dismissing its excessive speed violation. This case and others [specifically *Nehus v. Alaska Marine Towing, Inc.,* 519 F.Supp. 328 (W.D.Wash. 1981); *Crown Zellerbach Corp. v. Willamette-Western Corp.,* 519 F.2d 1327, 1329 (9th Cir. 1975); *Puerto Rico v. S/S Zoe Colocotroni,* 456 F.Supp. 1327 at 1333—36 (D.P.R. 1978), modified, 628 F.2d 652 (1st Cir. 1980), *cert. denied,* 450 U.S. 912 (1981)] create the impression that the *Pennsylvania* Rule is being applied in a way that attempts to reconcile its requirements with the courts' general notions of what the 'just resolution' should be. Such a procrustean application might serve to achieve equitable results, but it does little to further the idea of judicial integrity and the proper application of legal principles.

Outhu, *The Pennsylvania Rule: 109 Years Out and Homeward Bound,* 19 Loy. L.Rev. 353, 381) (1983).

It is an inherent feature as well as a key virtue of decisional jurisprudence that it must from time to time call up for examination longstanding decisions, thus remodeling the law to accommodate the lessons learned through the experience of application as well as to meet accepted, clearly discernible changes in

underlying conditions. This process in the past two decades has been marked by the overruling of a number of American admiralty decisions and the abrogation of their related doctrines. *The Harrisburg,* 119 U.S. 199 (1886), by *Moragne v. States Marine Lines,* 398 U.S. 375 (1970)[2]; *The Plymouth,* 70 U.S. (3 Wall.) 20 (1866) by *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972); *The Schooner Catherine,* 58 U.S. (17 How.) 170 (1855), by *United States v. Reliable Transfer, Co.,* 421 U.S. 397 (1975).

The overruling of long-standing decisions such as *The Harrisburg,* supra, and *The Schooner Catherine,* supra, reflect a clear trend to reshape the judicially formualted portions of the law, directing it away from strictly mechanical adherence to the rule of stare decisis and, toward the more surgical approach embodied in analytical jurisprudence. See *Union Oil Co. v. The San Jacinto,* 409 U.S. 410 (1972). Underwriting this movement is the equally apparent goal of aligning American maritime law, where appropriate, with comparable, recognized international rules, as evidence by this Court's decisions in *M/S Bremen v. Zapata Off Shore Co.,* 407 U.S. 1 (1972), and *United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975). But the *Pennsylvania* Rule is neither surgically incisive nor internationally acceptable, but rather constitutes "an anomaly which is no longer supportable", *Director*

---

[2] A published study has determined that of all the pre-1900 admiralty decisions of this Court, *The Pennsylvania,* 86 U.S. (19 Wall.) 125 (1874), the decision to which this application is directed, was the one most frequently cited. Pitts, *Admiralty's Pennsylvania Rule,* 24 So.Tex.L.J. 541 n.2 (1983). Ironically, the second most frequently cited decision was *The Harrisburg,* 119 U.S. 199 (1886).

*Gen'l of India Supply Mission v. S/S Maru,* 459 F.2d 1370, 1375 (2nd Cir. 1972), *cert. denied,* 409 U.S. 1115 (1973). See Tetley, *The "Pennsylvania" Rule, Etc.,* 13 J.Mar.L & Comm. 127 at 136-139 (1982).

This Court has an opportunity to, but did not, apply the *Pennsylvania* Rule in *Union Oil Co. v. The San Jacinto,* 409 U.S. 140 (1972). Then, in 1975, the Court adopted the proportionate-fault rule, while not addressing directly, the continuing validity of the *Pennsylvania* Rule, *United States v. Reliable Transf. Co.,* 421 U.S. 397 (1975) Commentators, sensing the final jurisprudential undermining of the *Pennsylvania* position, predicted its fall. See Goschka, *Goodbye to All That:—The Unlamented Demise of the Divided Damages Rule,* 8 J.Mar.L. & Comm. 51, 66 (1976); Owen, *The Origins and Development of Marine Collision Law,* 51 Tulane L.Rev. 759, 803 at n.8 (1977); Sager, *Apportioning Maritime Collision Damages: Applying the Rule of Reliable Transfer,* 34 Wash. & Lee L.Rev. 1237, 1246-49, 1262 (1977). And at least one decision, following the announcement of *Reliable Transfer,* concluded that *Reliable Transfer* necessarily overruled *"The Pennsylvania* and its progency." *People of State of Cal. v. Italia Motorship Ilico,* 534 F.2d 836, 840 (9th Cir. 1976).

"American admiralty courts are virtually alone today among major seafaring [or commercial] nations in recognizing the presumption of causation for violations of collision regulations." Outhu, *The Pennsylvania Rule: 109 Years Out and Homeward Round,* supra at 353. Thus, the question becomes whether such splendid isolation is either becoming or in keeping with the broader principle—that of international uniformity in the area of maritime collision law—the

rationale underwriting *Reliable Transfer*. The same reasons which motivated this court to exercise jurisdiction leading to its decision in *Reliable Transfer* suggest that it is time to call up and reexamine the *Pennsylvania* Rule.

## CONCLUSION

For these reasons, a writ of certiorari should issue to consider and overrule the presumption of causation established for the general maritime law of the United States by *The Pennsylvania*.

Respectfully submitted,

COURTNEY WILDER STANTON
136 E. Bay Street
Suite 301
Jacksonville, Florida 32202
(904) 355-5304
*Counsel of Record*

DEWEY R. VILLAREAL, JR.
P.O. Box 1438
Tampa, Florida 33601
(813) 228-7411

*Counsel for Petitioner*

# APPENDIX

Vivian Marie SELF, as administratrix of the estate of Danny Joe Self, deceased, etc., Plaintiff-Appellee, Cross-Appellant,

v.

GREAT LAKES DREDGE & DOCK COMPANY, a corporation, Defendant, Third Party Plaintiff-Appellant, Cross-Appellee,

and

Chevron Shipping Company, Third Party Defendant, Cross-Appellant,

GREAT LAKES DREDGE & DOCK COMPANY, a corporation, Plaintiff-Appellant, Cross-Appellee,

v.

CHEVRON SHIPPING COMPANY, Defendant-Appellee, Cross-Appellant,

and

Italia Societer Per Az Di Nav, Defendant.

Complaint of CHEVRON TRANSPORT CORPORATION, as owner of the S/S ROBERT WATT MILLER, in an action for exoneration from or limitation of liability, Plaintiff-Appellee, Cross-Appellant,

Great Lakes Dredge & Dock Company, a corporation, Claimant-Appellant, Cross-Appellee,

No. 85-3673

United States Court of Appeals, Eleventh Circuit,

Dec. 1, 1987

Ship collided with dredge barge flotilla, injuring and killing crew members of flotilla. Injured crew and survivors of dead crewmen instituted separate actions against employer and dredge operator. Operator filed third-party complaints in each action against operator of ship. Owner of ship filed complaint seeking limitation of liability. The United States District Court for the District of Florida, Howell W. Melton, J., entered judgment on jury verdict finding dredge operator guilty of negligence but also finding that such negligence in no way caused injury to crew. Plaintiffs appealed. The Court of Appeals, 688 F.2d 716, reversed and remanded. After denial of rehearing, 793 F.2d 135, and denial of certiorari, 460 U.S. 1083, 103 S.Ct. 1774, 76 L.Ed.2d 346, the District Court, No. 77-635-CIV-J-M, Daniel Holcombe Thomas, J., 613 F.Supp. 1428, found negligence and awarded damages, but limited damages because of settlement by plaintiff with one of the parties. Appeal was taken. The Court of Appeals, Clark, Circuit Judge, held that: (1) survivors of fatally injured seaman could recover from dredge and barge owner full damages, less amount already recovered from shipowner through settlement; (2) evidence did not support trial court's assumption that deceased seaman would never have earned more than minimum wage during periods he was not working on dredge; and (3) shipowner was not entitled to limitation of damages.

Affirmed in part, reversed in part and remanded.

Appeals from the United States District Court for the Middle District of Florida

Before CLARK, EDMONDSON and KEITH*, Circuit Judges

CLARK, Circuit Judge:

On February 5, 1975, the ship Robert Watt Miller struck the dredge Alaska and a barge in the St. Johns River near Jacksonville, Florida. A number of seamen were killed or injured in the accident, and this litigation ensued. After over twelve years of proceedings, this case is now before this court for a second time. In the earlier appeal, *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083, 103 S.Ct. 1774, 76 L.Ed.2d 346 (1983), this court reversed the judgment of the district court because of errors that led to findings of negligence but no award of damages. On remand, the district court conducted a nonjury trial, found negligence, awarded damages, but limited damages because of a settlement by the plaintiff with one of the parties. *See In re Chevron Transport Corp.*, 613 F.Supp. 1428 (M.D.Fla. 1985). All parties appealed to this court raising at least twelve issues altogether. For the reasons discussed below, we affirm in part and reverse in part the judgment of the district court.

## I. FACTS

The background and facts of this case are extensively detailed by the district court, *see* 613 F.Supp. at 1431-33, and in this court's earlier opinion, *see* 688 F.2d at 717, and will only be summarized here.

---

* Honorable Damon J. Keith, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

A. *The Parties*

Great Lakes Dredge and Dock Company ("Great Lakes") was the owner and operator of the dredge Alaska and the barge involved in the accident. The Chevron Transport Corporation owned the ship Robert Watt Miller, which collided with the barge and dredge. The vessel was operated by Chevron Shipping Company (collectively "Chevron" unless otherwise noted).

Vivian Marie Self is the widow of Danny Joe Self, a seaman and member of the crew of the barge (collectively "Self" unless otherwise noted). While engaged in the performance of his duties for his employer, Great Lakes, Danny Self lost his life in the accident. Vivian Self was one of the original plaintiffs in this action, which included claims of injured seamen and the representative of the one other seaman who lost his life in the accident. All plaintiffs other than Self have settled their claims. The case is an action at law under § 20 of the Jones Act, 46 U.S.C. § 688 and under general maritime law. *See The Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 839 (1970).

B. *The Accident*

To briefly summarize, at a little before noon on February 5, 1975, the Robert Watt Miller was proceeding at full speed up the St. Johns River approaching the Port of Jacksonville. The pilot of the vessel, knowing the Alaska was in the area, radioed to inform the dredge that the ship would soon be passing. The Robert Watt Miller came around a turn in the channel and saw for the first time the placement of the dredge and barge. Based only on visual estimates, the pilot guided the Robert Watt Miller to the north side of the channel. The leverman of the dredge Alaska, when he saw the Robert Watt Miller, stopped dredging and swung the bow of the dredge toward the south bank of the channel.

As the Robert Watt Miller continued up the channel, the pilot and master of the ship noticed a significant sheer of the vessel to port, toward the south side of the channel. According to the district court,

> an order of 10 degrees right rudder was given. The sheer continued and an order of 20 degrees right rudder was given. The master then initiated an order of hard starboard rudder and full ahead on the engines. That order was given at 12:09 but the sheer continued so a full astern was ordered at 12:11.
>
> Immediately before impact the pilot of the Robert Watt Miller radioed a warning to the Alaska informing the leverman to clear the dredge and barge of all personnel. He also blew the warning whistle. At about the same time the operator of the dredge's tender tug Tarheel State, lying on the port side of the Alaska, saw the danger, sounded the tug's whistle and moved out of the path of the Robert Watt Miller.
>
> Between 12:10 and 12:12, the time having not been exactly established, the bow of the Robert Watt Miller struck the Alaska. The bow first contacted the dredge's port anchor boom, then struck the hull about 100 feet aft of the bow. The impact broke the coupling between the Alaska and the [barge]. The Robert Watt Miller slipped down the side of the Alaska, came into contact with the Barge thus causing her to be loosened from the connections to the dredge. The momentum of the Robert Watt Miller continued forward along the [barge] and rolled the barge over on her starboard side. The Robert Watt Miller's engines were stopped at 12:13.
>
> When the Barge rolled over several crewmen were injured; two, including the plaintiff's decedent, lost their lives. The plaintiff's decedent, Danny Self, was a deckhand aboard the Alaska. Around noon on February 5, 1975, he and other crew members gathered

in the mess hall for lunch. One minute prior to collision one of Self's fellow crewmen went to the door of the mess hall, saw the Robert Watt Miller and yelled out to the others. At this time the men ran from the mess hall aft to the port side to a ladder near the stern. They continued down the ladder to the main deck and across the gangway to the barge. The men had just reached the barge when the impact of the Robert Watt Miller rolled it over. Eleven crew members were cast into the water.

Immediately, rescue attempts were made by the dredge's tender tugs, the survey boat Canaveral and a small fishing boat. In addition, crew members of the Alaska and the Robert Watt Miller threw life rings and flotation equipment attempting to save the men in the water.

Burke, a crew member of the Alaska, had grabbed his life jacket from the handrail when leaving the mess hall. He attempted to save Self by holding on to him, but the suction and current proved stronger than the grips of Self and Burke. Self was pulled away and lost his life.

*In re Chevron Transport Corp.*, 613 F.Supp. at 1433.

C. *The Litigation*

Each of the death and personal injury claimants instituted separate actions against their employer, Great Lakes Dredge & Dock Co. Great Lakes in turn filed third-party complaints in each action against Chevron Shipping Co., as operator of the Robert Watt Miller. Great Lakes also filed suit against Chevron Shipping Co. and Italia Societe Per Az Di Nav. As owner of the Robert Watt Miller, Chevron Transport Corporation filed a complaint seeking exoneration from or limitation of liability.

613 F.Supp. at 1431. Both Chevron companies settled with all of the personal injury and death claimants, including Self. Chevron paid Self the sum of $315,000. The original trial judge severed the third-party complaints and conducted a jury trial between the personal injury plaintiffs and Great Lakes. The jury found that Great Lakes was negligent but found that Great Lakes was not liable to the plaintiffs. For reasons explained in *Ebanks*, this court reversed. On remand, a different district judge consolidated the pending actions for a nonjury trial. All of the personal injury claimants except for Self settled with Great Lakes. At trial, Self's claims against Great Lakes were tried as well as liability issues between Great Lakes and *Chevron*. The issues of Chevron's and Great Lakes' damages were reserved for later trial.

At trial, all three major parties (Self, Great Lakes, and Chevron) made allegatons about causes of the accident and the injuries to seamen. Self alleged that Great Lakes failed to comply with various safety regulations requiring lookouts, life preservers, safety skiffs, and emergency drills. Self and Chevron alleged that Great Lakes improperly positioned the barge and dredge in the channel. Great Lakes alleged that Chevron negligently allowed its vessel to travel through the channel with insufficient information about the location of the dredge. Evidence on these and other claims were presented at trial.

The trial judge ruled that Chevron was negligent and liable because of the sheer of the vessel and that Great Lakes was liable because of the placement of the dredge and barge in the channel. The court found that Self's total damages amounted to $661,354 and that Chevron bore 70% of the fault for the accident while Great Lakes bore 30%. Because Self had already settled with Chevron, and because the trial court was of the view that this court's opinion in *Leger v. Drilling Well Control, Inc.*, 592 F.2d

1246 (5th Cir. 1979),[1] required an apportionment of damages, the court awarded Self a judgment of $198,406.20 against Great Lakes, which represents 30% of Self's total damages. The details of the rulings challenged on appeal are discussed more fullly below.

D. *This Appeal*

On appeal all three parties are proceeding as appellants or cross-appellants challenging rulings made by the district court below. In the six briefs filed on appeal, at least twelve issues are raised, and in this opinion we must reach all but two of the points raised. For the most part, we will address the issues in the order in which they were presented to this court.

## II. SELF'S CLAIMS AGAINST GREAT LAKES

The trial court found that Great Lakes negligently breached its duty to Danny Self by failing to follow Corps of Engineers safety regulations as required by Great Lakes' dredging contract with the government. 613 F.Supp. at 1437. The court also found that Great Lakes' negligence was a proximate cause of the drowning of Self, *Id.* at 1438. Although in its initial brief Great Lakes did not directly challenge these findings on appeal, we note as a preliminary matter that they are fully supported by the record and the applicable law. We must thus address Self's claims on appeal cm challenges to the amount and apportionment of damages.

A. *Apportionment of Damages*

In this appeal Self challenges the application by the district court of apportionment principles set out by this

---

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1209.

court in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), to the award of damages to Self. Because the court determined that Great Lakes was 30% responsible for the accident, and because Self had settled with Chevron (which was found by the district court to be 70% responsible), the court awarded Self only 30% of the total damages of $661,354. Chevron had paid Self $315,000 and taken a release. The district court was of the opinion that *Leger* required this result, which meant that Self received compensation in the sum of $513,406.20, or $147,948.80 less than the total damages of $661,354.

To understand *Leger*, it is necessary to briefly review the law controlling the apportionment of damages in maritime cases. As early as 1855, it was the law in American courts that damages arising from a maritime collision should be equally divided among joint tortfeasors, regardless of their degree of responsibility for the collision. *See The Schooner Catherine v. Dickinson*, 58 U.S. (17 How.) 170, 15 L.Ed. 233 (1855). The Supreme Court in *The Schooner Catherine* drew on earlier English law that required equal division of damages. Then, in 1975, finding the United States to be "virtually alone among the world's major maritime nations" in adhering to the equal division of damages rule, the Supreme Court overturned *The Schooner Catherine* and adopted a rule of proportional fault for liability for property damage arising from maritime collisions. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 403, 95 S.Ct. 1708, 1712, 44 L.Ed.2d 251 (1975).[2] *Reliable Transfer* did not address liability for personal injuries caused by a maritime collision.

---

[2] The primary holding in *Reliable Transfer* is narrow and relatively simple: "We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among parties proportionately to the comparative degree of their fault. . . ." 421 U.S. at 411, 95 S.Ct. at 1715-16.

The Fifth Circuit in *Leger* extended the proportional fault rule of *Reliable Transfer* to reach personal injuries. 592 F.2d at 1249.[3] The *Leger* court then endorsed a rule set out by the district court requiring that "the judgment awarded to the claimant against a nonsettling defendant is credited with the dollar amount represented by the proportion of negligence, if any, attributed to the settling parties," *Id.* at 1248. The court in *Leger* explicitly took the approach that the plaintiff who settles with one joint tortfeasor takes the benefit, or burden, of his bargain. If he makes a "good" settlement, he could receive total compensation more than his actual damages, while if he makes a "bad" settlement he would receive less than his actual damages. *Id.* at 1250 & n. 9.[4]

Two months after this court issued its opinion in *Leger*, the Supreme Court decided *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979). The *Edmonds* opinion included language that cast serious doubt over the full implications of the *Leger* approach. In the wake of *Edmonds*, the Eleventh Circuit backed away from and disavowed certain aspects of *Leger*. *See Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982); *Drake Towing Company v. Meisner Marine Construction Company*, 765 F.2d 1060 (11th Cir. 1985).

---

[3] We have no doubts about the correctness of this aspect of the *Leger* holding.

[4] In *Leger*, the plaintiff made a "good" settlement and ultimately received $310,171.05 in compensation for his injuries, even though the injuries amounted to only $284,090. Similarly, in the primary Eleventh Circuit case to follow *Leger*, the plaintiff received $121,000 in compensation although his damages were only $60,000. *See Gormly v. Van Ingen*, 736 F.2d 624, 625 (11th Cir. 1983). The *Leger* court overlooked in its calculations that Travelers Insurance Company received $82,331 of the $127,840 received by Leger from Dresser, leaving Leger with $246,321 ($63,920 balance plus $182,331 initially paid by Travelers). Thus, Leger received less than the total damages awarded.

Although not directly related to the holding in the case, the Court's opinion in *Edmonds* strongly and repeatedly reaffirmed the right of a plaintiff to recover from any single tortfeasor the full compensation for damages incurred. " 'Nothing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a commonlaw action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss.' " 443 U.S. at 260 n. 9, 99 S.Ct. at 527 n. 9 (quoting *The Atlas*, 93 U.S. 302, 23 L.Ed. 863 (1876)). The Court noted that a "concurrent tortfeasor generally may seek contribution from another, but he is not relieved from liability for the entire damages even when the nondefendant tortfeasor is immune from liability." 443 U.S. at 260 n. 8, 99 S.Ct. at 527 n. 8.

The Supreme Court in *Edmonds* specifically considered the implications of its opinion in *United States v. Reliable Transfer*, on which the *Leger* decision is based: "[In *Reliable Transfer*] we did not upset the rule that the plaintiff may recover from one of the colliding vessels the damage concurrently caused by the negligence of both." *Id.* at 271 n. 30, 99 S.Ct. at 534 n. 30 (emphasis in original). The Court noted that "[c]ontribution remedies the unjust enrichment of the concurrent tortfeasor, and while it may sometimes limit the ultimate loss of the tortfeasor chosen by the plaintiff, it does not justify allocating more of the loss to the innocent employee, who was not unjustly enriched." *Id.* In our opinion, this statement rejects the philosophy in the *Leger* case that it is the plaintiff who bears the loss or obtains the gain under facts such as are in this case. The philosophy governing *Edmonds* is clear: any inequity which results from the implementation of a seaman's damage award should be borne by the tortfeasors rather than the seaman himself. *Joia v. Jo-Jo Service Corp.*, 817 F.2d 908, 917 (1st Cir. 1987).

In *Ebanks*, this court's earlier opinion in this case, the panel considered the language quoted above and concluded that "[*Leger's*] effect as precedent has been weakened by *Edmonds*." 688 F.2d at 720. Then, in *Drake Towing*, the court ordered that one joint tortfeasor pay full damages (less that attributable to the plaintiff's own negligence), even though the plaintiff had already settled with another joint tortfeasor. *See* 765 F.2d at 1067. The court considered the *Leger* opinion, and described the *Leger* holding in extremely narrow terms, thereby construing *Leger* to avoid a conflict with the approach endorsed by the Supreme Court in *Edmonds*. At least one other circuit court has determined that the *Leger* approach cannot withstand the more recent *Edmonds* opinion; that court specifically approved of this court's *Ebanks* decision, while specifically rejecting *Leger*. *See Joia*, 817 F.2d at 915-17.

We conclude that the district court erred in relying upon the *Leger* opinion in requiring Great Lakes to pay Self only $198,406.20 instead of $356,350. As we previously mentioned, although this court in *Ebanks* reversed the district court in this case because of a misapplication of the *Leger* principles, it is not altogether surprising that on remand the district court (through a different district judge) again misapplied *Leger*. The *Ebanks* case, in not following *Leger*, relied in part on the fact that in *Leger* all tortfeasors were before the court and jury for the sole purpose of allocating to each tortfeasor its percentage of liability for paying Leger's damages in the amount of $284,090, awarded to Leger in a prior jury trial.

> The trial court granted Dresser's motion for a new trial on the ground that the jury should have been informed that DWC and Continental were originally defendants, that Leger had settled his claims against them, and that Travelers was to receive one-half of all sums received by Leger from Dresser. The court considered it necessary that the jury be aware of the

> continuing interest in the lawsuit of the various witnesses from DWC and Continental.

*Leger*, 592 F.2d at 1247.

*Leger* thus differs from this case because Chevron was not before the court in the trial of this case at the first trial but was a party in this second trial for the purpose of assessing liability between Chevron and Great Lakes as to their purported claims against each other. However, at no time after the settlement did Self seek any further damages from Chevron. Under the principle announced in *Luke v. Signal Oil & Gas Co.*, 523 F.2d 1190 (5th Cir. 1975), contributions cannot be obtained by one tortfeasor from a tortfeasor who has settled with and been released by the claimant. The purpose of the second trial in this case was not the same as the second trial in the *Leger* case, which had as its sole purpose the apportionment of damages between the tortfeasors.

There are other facts that distinguish this case from those very peculiar facts in *Leger*. As mentioned previously, Travelers' policyholders, DWC and Continental, had a monetary interest in the amount of damages collected by Leger from nonsettling codefendant Dresser. Their interest in Leger's damages was that Travelers was to receive one-half of any funds collected by Leger from Dresser. There is no similiar agreement in this case. Another distinctive fact was that in the second trial on the sole issue of the apportionment of liability amongst the three tortfeasors, DWC, Leger's employer was found to be guilty of no negligence, thus skewing the award of damages in the amount of $82,331.05 paid by Travelers in DWC's behalf to Leger in settlement. Thus, this sum was not used in reducing the judment and was a windfall to Leger, which offset in part the sum that Leger had to pay to Travelers. The last distinctive difference between the *Leger* case and this one is that Leger was found to

be 85% contributorily negligent, which affected the complicated calculations.

Because of these distinctions, namely the change in the law by *Edmonds* and *Ebanks*, and the difference in the facts, we do not consider *Leger* as controlling our opinion in this case.

We do not overlook the fact that in a case such as this, a joint tortfeasor may be left paying a higher or lower percentage of the damages than it caused. Nor do we overlook the rule that there may be joint contribution amongst tortfeasors in an admiralty case and that in the absence of a settlement, the amount of contribution turns on the percentage of fault of each joint tortfeasor. *See Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974). *Leger* upheld that "settling defendants are relieved of any further liability to the plaintiff." 592 F.2d at 1248 (relying upon *Luke v. Signal Oil & Gas Co., supra*). It is obvious that the rule announced in *Luke* overrides the right of contribution.

We acknowledge that the rule that we adopt today may cause disparity in the percentage of payment as between the settling and nonsettling tortfeasors in maritime personal injury actions. We note, however, that this court is not unique in adopting such a rule. Among those states that have incorporated comparative fault principles into their tort systems, but have retained the rule that there is not contribution from settling tortfeasors, there is a split of authority as to how a nonsettling tortfeasor's share of damages should be calculated. Some states have adopted the rule that *Leger* employed, while others require that the nonsettling tortfeasor's share be reduced only by the amount paid by a settling tortfeasor. Prosser and Keeton, *The Law of Torts*, § 67 at 476 (5th ed. 1984).

As we are bound by the Supreme Court's guidance and the rule in *Edmonds*, we adopt the latter of these ap-

proaches.[5] We hold that Self can recover from Great Lakes the full damages, less the amount already recovered from Chevron through the settlement. The *Leger* approach has much merit in terms of efficiency and realistic settlement practices, but *Edmonds* and Eleventh Circuit cases following *Edmonds* require this result.[6]

Finally, we note that the remedial nature of general maritime law, and the Jones Act in particular, support this result. "The joint and several loss allocating mechanism which serves to provide an injured seaman his full judg-

---

[5] In doing so, we note that the facts in this case make our decision compelling. Self was innocently eating his lunch on the barge some thirteen years ago as the Robert Watt Miller was bearing down upon the barge. His widow settled her claim and her children's claims with Chevron, owner of the Robert Watt Miller. The claim against Great Lakes is still unpaid and the subject of this appeal. Both tortfeasors were obviously negligent. Self's widow should not be penalized for settling with Chevron; nor should one in her position be forced to await the outcome of a lawsuit between two litigious defendants in order to ensure receipt of damages properly assessed against them.

[6] Effectively, our holding today reaffirms the rule set out in *Billiot v. Sewart Seacraft*, 382 F.2d 662, 664-65 (5th Cir. 1967), which the *Leger* court rejected based on *Reliable Transfer*. Because the Supreme Court's more recent opinion in *Edmonds* reveals that *Leger* misconstrued *Reliable Transfer*, we return to the rule in effect before *Leger* modified it. Because *Leger* was a panel decision, and the en banc court has not overruled *Billiot*, we consider *Billiot* still to be valid law. *Billiot* held that a claimant may settle with one tortfeasor, proceed against another for the total amount of the damages, and the court will deduct the amount paid by the settling tortfeasor from the recovery against the second tortfeasor. This results in the claimant receiving the exact amount of his damages. The risk or wisdom of settling in contrast to going to trial falls upon whichever tortfeasor had the best foresight.

> We note that, unlike the Eleventh Circuit, the Fifth Circuit has fully endorsed the *Leger* approach, and has plainly stated the effect it can have on a seaman's recovery. *See, e.g., In re Incident Aboard D/B Ocean King*, 813 F.2d 679, 689 (5th Cir. 1987); *Diggs v. Hood*, 772 F.2d 190, 196 (5th Cir. 1985). Because we think this approach is inconsistent with Supreme Court doctrine, we cannot agree with the Fifth Circuit.

ment is consonant with the policy behind the Jones Act, to provide protection to seamen who are victims of negligence." *Joia*, 817 F.2d at 917 (citation omitted). In cases such as this, the general goal of maritime law is to provide quick and full compensation to the injured seaman, while leaving the primary litigation dispute to the question of which joint tortfeasor is liable for what percentage of the damages. Historically maritime law has treated seamen as in need of special protection; until the Supreme Court suggests otherwise, we cannot move away from that special protection to an arguably more "efficient" system in which an injured seaman is viewed as an equal party with equal bargaining power. Because of our resolution of this claim, we need not reach Self's contention that the trial court erred by apportioning liability based on degrees of fault for the collision, instead of apportioning liability based on degrees of fault for the death of Danny Self. Arguably, because Chevron had nothing to do with the safety violations of Great Lakes, Great Lakes bears a greater degree of responsibility for Self's death than it does for the collision itself. We do not address this argument.

**B.** *Specific Findings of Damages*

On appeal, Self argues that the district court failed to make adequate findings of fact as required by Fed.R.Civ.P. 52 concerning various claims for damages. With regard to certain issues discussed below, we agree. Rule 52 requires that the trial court "find the facts specially and state separately its conclusions of law thereon." "[T]he findings must be specifically detailed to give [an appellate court] a clear understanding of the analytical process by which ultimate findings were reached and to assure us that the trial court took care in ascertaining the facts." *Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 433 (5th Cir. 1977). "This court cannot be left to guess. The findings and conclusions we review must be expressed with sufficient particularity to allow us to determine rather than speculate that the law has been correctly applied." *Hy-*

*drospace-Challenger, Inc. v. Tracor/MAS, Inc.*, 520 F.2d 1030, 1034 (5th Cir. 1975).

Although the district court's opinion is generally careful and thorough, it does fail to make sufficient findings to permit adequate review of Self's claims for damages. A remand for appropriate findings is the normal procedure. *See Armstrong v. Collier*, 536 F.2d 72, 77 (5th Cir. 1976). A "remand is not required if a complete understanding of the issues is possible in the absence of separate findings and if there is a sufficient basis for the appellate court's consideration of the merits of the case. Where the acts relied upon to support the judment are in the record and are undisputed remand is unnecessary." *Gulf Towing Co. v. Steam Tanker, AMOCO New York*, 648 F.2d 242, 245 (5th Cir. Unit B June 1981). As discussed below, however, Great Lakes and Self disagree about the appropriateness of certain claims for damages. In this case, we think it more appropriate for the district court to make the initial findings on these claims, because that court has had the benefit of receiving first hand all of the evidence of the events leading to Danny Self's death.

1. *Conscious Pain and Suffering*

The trial court made no findings or award of damages for conscious pain and suffering experienced by Danny Self before he died. Although the lower court's opinion makes no reference to pain and suffering, the record paints a vivid picture of the final moments of Self's life. According to Burke, the seaman who tried to save Self, men thrown into the water when the barge overturned were sucked under the water for what "seemed like an eternity." Record, Volume 24, at 61. After Burke surfaced, Self then surfaced, and Burke saw that Self had no life Jacket. Burke told Self to hold on to him, which Self did. *Id.* at 62. According to Burke,

> we struggled more or less. For the most part, his feet were on my shoulders and I was kicking, trying

> to surface. He was on top of me. That's where we stayed. Then we hit the ship and that's when he lost it, or I lost him, however it worked out. We lost our grip on one another. I saw him leaving me. I tried to reach him, but the buoyancy of my jacket kept me up so I couldn't. And I just saw him slip under me. . . . I know the water was moving very swiftly. . . . It was cold. I don't know what the exact temperature was, but it was pretty icy to go overboard, I know that.

*Id.* at 62-64. It seems clear that Self was conscious for at least a few moments after the barge overturned and before Self and Burke lost their grip and sucked Self under the water to his death.

A damages award for conscious pain and suffering is appropriate, depending on the facts, in maritime wrongful death actions. *See Hlodan v. Ohio Barge Line*, 611 F.2d 71, 76 (5th Cir. 1980); *Dickerson v. Continental Oil Company*, 449 F.2d 1209, 1216 (5th Cir. 1971). In *Hlodan*, the "evidence showed that for some undetermined number of minutes before his death Hlodan was aware of his predicament, and that his death by drowning was not instantaneous." 611 F.2d at 76. In *Dickerson*, the court wrote that if "the decedent was conscious while in the water, . . . then it must be without dispute that he did suffer some pain . . . from the anguish of struggling against drowning." 449 F.2d at 1216. We think that in this case the district court should have made specific findings about pain and suffering damages to which Self may be entitled. *See Lettsome v. United States*, 411 F.2d 917, 923 (5th Cir. 1969) (remanding for specific Rule 52(a) findings on pain and suffering in maritime injury case).

2. *Unseaworthiness*

Similarly, the district court made no specific mention or findings about the seaworthiness of the dredge Alaska. It may be that the lower court factored a finding of unsea-

worthiness into the award of damages, or that the court found that the vessel was in fact seaworthy. Without any discussion of seaworthiness and of whether any unseaworthiness should enhance Great Lakes' liability to Self, however, we cannot adequately review the district court judgment. *See Glapion v. MS Journalist*, 487 F.2d 1252 (5th Cir. 1973) (affirming specific findings concerning seaworthiness due to defect in ship, but remanding for specific findings concerning safety violation). In light of the district court's award of nonpecuniary damages to Self, we can almost assume that the court found the vessel to be unseaworthy. *See Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979) (en banc) (holding that nonpecuniary damages cannot be awarded under Jones Act). Rather than speculating, however, we prefer to allow the district court to state its findings clearly.

The record suggests that a finding of unseaworthiness would be plausible. Violations of safety regulations can lead to findings of unseaworthiness, *see Manning v. M/V "Sea Road,"* 417 F.2d 603 (5th Cir. 1969), as can the failure to adequately train a ship's crew, *see Hercules Carriers, Inc. v. Claimant State of Florida*, 768 F.2d 1558 (11th Cir. 1985). We leave to the district court on remand the determination in the first instance of questions of seaworthiness and possible enhancement of damages. *See Farbwerke Hoeschst A.G. v. M/V "Don Nicky,"* 589 F.2d 795 (5th Cir. 1979) (remanding for specific findings on unseaworthiness and damages).

3. *Punitive Damages*

As with unseaworthiness, the lower court order is silent about punitive damages. Punitive damages should be available in cases where the shipowner willfully violated the duty to maintain a safe and seaworthy ship, as was found to exist on the part of Great Lakes by the district court, or where the shipowner's acts (or failures to act) recklessly increased the danger of a disaster. In this case, Great

Lakes had been warned by local pilots' association about the possibility of the exact type of collision that occurred (involving a ship shearing into the barge), yet Great Lakes chose to ignore the warnings, and may not even have passed the warnings on to the crew of the dredge Alaska. Furthermore, Great Lakes' failure to maintain adequate safety devices and procedures on the Alaska may rise to the level of willfulness or recklessness. In light of these facts, we think that some specific determination about punitive damages must be made. We will leave the initial decision to the district court on remand. *See Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. Unit B July 1981) (remanding for findings on punitive damages).

4. *Prejudgment Interest*

Again, the lower court opinion is silent about prejudgment interest. In general,

> prejudgment interest should be awarded in admiralty cases—not as a penalty, but as compensation for the use of funds to which the claimant was rightfully entitled. Discretion to deny prejudgment interest is created only when there are "peculiar circumstances" that would make it inequitable for the losing party to be forced to pay prejudgment interest.

*Noritake Co. v. M/V Hellenic Champion*,, 627 F.2d 724, 728 (5th Cir. Unit 1980) (footnote and citation omitted). Although it is accepted practice to *award* prejudgment interest without making specific findings, *see id.*[*cf1 at 729, a denial of interest usually calls for specific findings.*

> [I]n any admiralty case in which the trial court refuses to award prejudgment interest, the best practice would be for it to detail the peculiar circumstance it has found, and specifically indicate that it is denying prejudgment interest as an exercise of the discretion created by the existence of peculiar circumstances.

*Id.* at 729 n. 4. In the absence of clear findings by the district court, an appellate court could search the record for "peculiar circumstances" and decide to award or deny prejudgment interest without a remand. *See Noritake*, 627 F.2d at 730 (awarding interest); *Parker Towing Co. v. Yazoo River Towing, Inc.*, 794 F.2d 591, 594 (11th Cir. 1986) (denying interest). In this case, however, because we are remanding to the district court for reconsideration of other possible awards of damages, we choose also to remand this question for explicit findings by the court below.[7]

C. *Minimum Wage for Life*

Before his death, Danny Self did not typically work on a dredge year round (presumably because of the seasonal nature of the work). In addition to the dredge work, the district court "assume[d] Mr. Self would also work 790 hours per year . . . at a job earning minimum wage." 613 F.Supp. at 1438. On appeal, Self contends that the district court erred by making this assumption, arguing that the "assumption" was not a finding of fact, and that if it was, it is clearly erroneous.

In reviewing the district court's opinion, it is not clear whether this assumption was a finding, and thus it is unclear whether the assumption deserves the deference normally accorded to findings of fact. For purposes of this decision, we will assume that the assumption *is* a finding

---

[7] A remand in this case is especially appropriate because there is a possibility that some form of interest was already calculated into the district court's award to Self. Apparently, the district court adopted without modification the pecuniary loss calculations proposed by Great Lakes' expert, *see* Record, Vo. 29 at 12-62, and there is a suggestion that these figures include some type of interest, *see id.* at 26. If, in fact, prejudgment interest was included in the award made by the court below, appellate review would have been simplified if that fact was made clear in the district court's decision, along with an explanation of how the interest was calculated.

of fact. Having searched the record on appeal, however, we can find no evidence to support the assumption, and we thus determine that, based on the current record, it is clearly erroneous. The trial judge apparently drew the assumption from an assumption made by Great Lakes' expert. *See supra* note 12. Yet, as the expert admitted, his assumption did not take into account any experience or skills that Self would acquire in his dredging work, notwithstanding the fact that the district court found that Self would advance to the position to mate and then leverman on the dredge. By adopting the expert's assumption, the district court essentially held that a leverman (who is second only to the captain of the dredge) would hold only semi-skilled jobs during the off-months, for the remainder of his career. The assumption also ignores the uncontradicted evidence that prior to his death Self had worked in the construction field during at least one of the non-dredge periods, and that the wages in the construction field were typically higher than minimum wage. Based on the record, we thus hold that the district court's assumption is clearly erroneous.

On remand, the trial court may decide to require more evidence as to Self's non-dredge. We do not reject the possibility that based on further evidence the trial court will conclude that Self would only earn the minimum wage for at least a portion of his career. We only hold that based on the record as it now stands, there is no support for the trial court's assumption that Self would never have earned more than the minimum wage during the periods he was not working on a dredge.[8]

---

[8] We acknowledge that one likely reason behind the trial judge's adoption of the defendant's expert's assumption is that the plaintiff failed to present completely comprehensive evidence of these damages. While there is sufficient evidence in the record to make us question the trial court's assumption, we must repeat Judge Johnson's admonition that "it would behoove future litigants when preparing for trial

D. *Reduction of Future Wages to Present Value*

Self challenges on appeal the method used by the district court to calculate the present value of its award of future earnings. As Great Lakes concedes in their brief on appeal, the district court used the "case-by-case" method that was specifically rejected by the en banc court of the former Fifth Circuit in *Culver v. Slater Boat Co.*, 722 F.2d 114, 120 (5th Cir. 1983) (en banc).[9] *Culver* required that courts in this circuit use the "below-market discount" method to adjust awards of future damages to present value. The district court's mistake is largely due to its reliance on Great Lakes' expert, who used the incorrect method.

In this appeal, Great Lakes argues that the error was harmless. Its expert used a 10.75% discount rate, which is substantially higher than the 1%-3% rate approved in *Culver*. Because their expert allowed for inflation in the initial calculations (contrary to the approach used in *Culver*), Great Lakes argues that the effective discount rate is only marginally higher than the 3% rate approved in *Culver*. Thus, according to Great Lakes, the use of the improper method was harmless.

For two reasons, we decline to reach the question of whether the use of the discredited case-by-case method can ever be harmless. First, the Great Lakes expert applied the too-high discount rate to *all* future damages, including

---

to study carefully the horizon of damages before heading off down the trial. . . . The record at trial must be fully developed on the issue of damages. . . . Relying on an appellate court to sort through the record and calculate the appropriate damages merely delays achieving a just and reasonably accurate final judgment." *Dealke v. John E. Graham & Sons*, 756 F.2d 821, 834 (11th Cir. 1985). If the trial court on remand concludes that plaintiff was negligent in presentation of evidence on this issue, he may reach the same conclusion as he initially reached. We remand because it is not clear to us why the minimum wage figure was used.

[9] *Culver* is binding precedent on this court. *See Stein v. Reynolds Securities, Inc.*, 756 F.2d 821 (11th Cir. 1985).

those not adjusted upward for inflation. Thus, at least for certain portions of the damages award, the effective discount rate was substantially higher than is proper. Second, in light of our remand above for a reassessment of the use of the minimum wage for Danny Self's entire life, it is likely that the entire damages figure will need to be recalculated. On remand, the district court should use the "below-market discount" method described in *Culver* and *Deakle v. John E. Graham & Sons*, 756 F.2d 832 (11th Cir. 1985).

E. *Damage for Loss of Society*

The district court awarded to Mrs. Self $70,000 for the loss of society, love and companionship of her deceased husband, and the court awarded $15,000 to each of Danny Self's two children. On appeal, Mrs. Self argues that these awards are grossly inadequate. Self cites numerous cases where $200,000 to $500,000 was awarded for loss of society. Great Lakes, on the other hand, cites cases where $25,000 to $75,000 was awarded for loss of society.

In reviewing the amount of damage awards, this court is generally limited to the question of whether the trier of fact abused its discretion. *See Hawkes v. Ayers*, 537 F.2d 836, 837 (5th Cir. 1976). While the district court did not describe how it determined the amount of the awards for loss of society, we do not find any abuse of discretion in the amount. "Although the award was small, it was not 'unconscionably inadequate,' therefore, we may not disturb the award on appeal." *Kramer v. Keys*, 643 F.2d 382, 386 (5th Cir. Unit A Apr. 1981)(citation omitted). We thus affirm the district court's award of damages for loss of society.[10]

---

[10] On remand, the trial court can, at its discretion, consider additional evidence on this point, and increase the award for loss of society if appropriate. We do not hold that the amount of the award is at all *required* to be at the level set by the district court, only that the level set is within the range of permissible awards.

## III. GREAT LAKES' CLAIMS AGAINST CHEVRON

The remainder of this opinion deals with issues arising out of Chevron's and Great Lakes' attempts to shift responsibility for the collision to determine apportionment of damages to their respective vessels. As discussed above, the district court found that Great lakes was negligent toward Danny Self by failing to maintain and conduct certain required safety features and procedures. The lower court also found that Great Lakes violated the Pilot Rules for Inland Waters, 33 C.F.R. § 80.26(c) (1974) (in effect at the time of the collision), and that the violation was a contributing cause of the collision. On appeal, Great Lakes challenges this finding, as well as two other rulings made by the district court.

### A. *Violation of 33 C.F.R. § 8026(c)*

The Pilot Rules for Inland Waters, in force in February of 1975, required that

> [w]hen any pipe line or swinging dredge shall have given an approaching vessel or tow the signal that the channel is clear, the dredge shall straighten out within the cut for the passage of the vessel or tow.

33 C.F.R. § 80.26(c) (1974) (no longer in effect). The district court held that Great Lakes violated that regulation because, instead of "straightening out" and bringing the line of the dredge so that it was parallel to the channel, the leverman of the dredge brought the bow closer to the bank of the river (and thus farther from the center of the channel). Great Lakes argues that the trial judge misinterpreted the regulation and that even if there was a violation of the regulation the district court incorrectly applied the rule in *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1874), to shift the burden to Great Lakes to disprove that the violation was related to the accident.

1. *The Violation*

Both Chevron and Great Lakes (and Self in support of Chevron on this issue) argue that the plain language of the rule supports their positions. Chevron argues that the words "straighten out in the cut," or the channel, means just that—straighten out instead of lie at an angle. Great Lakes on the other hand argues that if the rule intended to require that a dredge be parallel to the channel, it would have so stated. After hearing testimony on the meaning of § 80.26(c), the trial judge determined that "straighten out in the cut" meant "straighten out to be parallel to the line of the cut." The court then found that Great Lakes violated that rule. While a "finding of statutory fault is primarily a factual issue governed by the clearly erroneous standard," *Orange Beach Water, Sewer and First Protection Authority v. M/V Alva*, 680 F.2d 1374, 1380 (11th Cir. 1982), we must review the district court's ruling to ensure that it did not misinterpret the meaning of the rule.

Great Lakes argues that the district court's interpretation that the rule means "parallel to the channel" is in conflict with the Coast Guard's interpretation of the rule; Great Lakes argues that we must defer to the agency's interpretation of its own rule. The "agency interpretation" that Great Lakes advances is the formal report made by the Coast Guard following its investigation into the collision. Great Lakes argues that in the report's conclusions, no mention was made of a violation of § 80.26(c), and this constitutes an interpretaton by the Coast Guard that the rule did not mean "parallel to the channel" and thus the rule was not violated.[11] We note that, as Great Lakes

---

[11] In its brief, Great Lakes quotes from the conclusions of the Coast Guard's report" "The corrective action of moving completely out of the channel *at pilot request* (as opposed to swinging the bow over) taken by Great Lakes Dredge and Dock Company in response to the pilots [sic] letter and Coast Guard requests was adequate to allow safe

concedes, the legal conclusion that Great Lakes did not violate the rule is inadmissible evidence. *See Smith v. Ithaca Corporation*, 612 F.2d 215, 223 (5th Cir. 1980). We decline to take Great Lakes' invitation to constsue the absence of any mention of § 80.26(c) as a formal agency interpretation of that rule. This case is quite different from cases in which an agency has formally interpreted a rule, or has promulgated an interpretation in the Code of Federal Regulations. *See, e.g., Allen M. Campbell Company General Contractors v. Lloyd Wood Construction Co.*, 446 F.2d 261 (5th Cir. 1971). In this case, we have only the Coast Guard's silence, which we will not take to be a formal interpretation that "straighten out in the cut" does not mean "parallel to the channel."

In the absence of any formal interpretation by the Coast Guard of the meaning of § 80.26(c), we find that the district court reasonably relied on the testimonial evidence presented by a number of witnesses, including Coast Guard officials and a Great Lakes employee, to the effect that they would interpret the rule to mean "parallel to the channel." Great Lakes cites a number of cases involving facts very similar to those here where the courts did not find any fault in a dredge swinging its bow out of the channel. *See e.g., The Ditmar Koel*, 65 F.2d 555 (5th Cir. 1933); *The Freeport*, 99 F.2d 842 (4th Cir. 1938). None of

---

navigation in the area." (emphasis added). Great Lakes argues that the quoted language suggests that Great Lakes took the appropriate action. Reading the report in its entirety, however, we reach a different conclusion. The report describes two methods for a dredge to move out of the way of a passing ship: swinging the bow over or moving the *entire* dredge out of the way. The report details how Great Lakes only moved the bow over. We read the quoted language to approve the other method—moving the entire dredge out of the channel. We do not perceive any conclusions about simply moving the bow over. The primary point of the Coast Guard's conclusion from which Great Lakes quoted is that the local pilots should be informed that they should, in the future, request that the entire dredge be moved, instead of merely having the bow swung over.

the cited cases, however, involved an interpretation of § 80.26, and there was no suggestion in any of the cases that there was a then-existing rule that the dredge arguably violated. Here, we have a rule that requires a dredge to "straighten out in the cut." After considering the rule and the testimony, we affirm the district court's interpretation that the rule means "parallel to the channel," and that Great Lakes violated the rule.[12]

2. *The Pennsylvania Rule*

Having affirmed the district court's determination that Great Lakes violated 33 C.F.R. § 80.26(c) (1974), we must now consider the applicability of the rule set out in *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1874), to the facts of this case. In *The Pennsylvania*, the Supreme Court held that when a ship involved in a collision is in violation of a statutory rule designed to prevent collisions, the burden shifts to that ship to disprove that the violation was a contributing cause of the collision. Specifically, the Court wrote:

> The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a

[12] Arguably, a commonsense approach supports Great Lakes: By swinging the bow toward shore, instead of bringing the dredge to a position parallel to the channel, Great Lakes actually brought the dredge farther out of the channel. As was argued below, however, a rule requiring the dredge to be parallel to the channel serves a number of plausible goals, including presenting a lesser target for an approaching vessel and giving an approaching vessel the proper perspective of the center line of the channel. The district court presumably had this second point in mind when it concluded that the "angle at which the Alaska and [the barge] was positioned in the Drummond Creek Cut distorted the perception of the navigators of the Robert Watt Miller as the tanker came around Broward Point Turn." 613 F.Supp. at 1436.

> contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the cases, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandante of the statute.

*Id.* at 136, 22 L.Ed.2d at 151. In that case, the Court held that although the steamship Pennsylvania was primarily responsible for its collision with the bark Mary R. Troop, the bark was also liable because of its violation of a rule requiring the use of foghorns when underway in fog.

Since its inception over one hundred years ago, *The Pennsylvania* rule has increasingly come under attack, with courts and commentators terming the rule "harsh," *Board of Commissioners v. M/V Farnsum*, 574 F.2d 289, 297 (5th Cir. 1978), and "drastic," G. Gilmore & C. Black, *The Law of Admiralty*, 494 (2d ed. 1975). The harshness of the rule is clear when viewed in light of the pre-*Reliable Transfer* rule of *The Schooner Catherine*, requiring equal division of damages among joint tortfeasors. *See The Pennsylvania*, 86 U.S. (19 Wall.) at 138, 22 L.Ed. at 152. Prior to *Reliable Transfer*, a ship that violated a rule but could not overcome *The Pennsylvania* burden would be liable for an equal share of the damages caused by a collision, even though the violation only marginally contributed to the collision. Critics have advocated the rule's abolition, *see* Tetley, *The Pennsylvania Rule—An Anachronism? The Pennsylvania Judgment—An Error?* 13 J.Mar.L & Com. 127 (1982), and courts, including the former Fifth Circuit, have ensured that *The Pennsylvania* burden is not insurmountable, *see* [cf2[Compania de Madera de Caibarien v. The Queenston Heights, 220 F.2d 120, 122-23 (5th Cir. 1955).

Great Lakes goes beyond criticizing *The Pennsylvania* rule, however, and argues that the rule has been over-

turned by the Supreme Court in *United States v. Reliable Transfer Co. See supra* at ___ ___. In support of this claim, Great Lakes cites a Ninth Circuit case which includes language suggesting that *The Pennsylvania* decision was overruled by *Reliable Transfer. See People of the State of California v. Italian Motorship Ilice*, 534 F.2d 836, 840 (9th Cir. 1976). Great Lakes, however, misunderstands the effect of *Reliable Transfer* and misreads the Ninth Circuit's *Ilice* decision, which expressly refused to distrub an application of *The Pennsylvania* rule by the district court in that case. *Id.*

What Great Lakes misunderstands, and what the Ninth Circuit noted, is that the adoption of comparative fault by the Supreme Court in *Reliable Transfer* did nothing to overturn *The Pennsylvania* rule, but instead simply eased the rule's harshness.[13] Prior to *Reliable Transfer*, a ship unable to overcome *The Pennsylvania* rule, bore an equal portion of the liability; after *Reliable Transfer*, a ship that violated a statutory rule is only liable in proportion to the comparative degree of fault for the accident.

To make clear what the rule set out in *The Pennsylvania* involved presumptions and burdens of proof, while the *Reliable Transfer* case involved divisions of liability. The goals underlying *The Pennsylvania* rule—a concern that maritime rules be strictly observed—were not in the least disturbed by the *Reliable Transfer* decision. "The clear general rule is that the navigational rules are 'rigorously endorced' and strictly interpreted." *Garrett v. Higgenbotham*, 800 F.2d 1537, 1540 n. 6 (11th Cir. 1986) (citing *Belden v. Chase*, 150 U.S. 674, 698, 14 S.Ct. 264, 271, 37 L.Ed. 1218 (1893)). "Masters [of ships] are bound to obey the rules, and entitled to rely on the assumption that they will be obeyed. . . ." *Belden*, 150 U.S. at 699, 14 S.Ct. at

---

[13] Even the critics of *The Pennsylvania* rule acknowledge that *Reliable Transfer* did not overturn it. *See* Tetley, *supra*, 13 J.Mar.L & Com. at 145.

272. The need to strictly enforce maritime rules is as strong today as it was in 1874, and the *The Pennsylvania* decision announced one hundred years ago still further that purpose. We thus find that the district court appropriately applied *The Pennsylvania* rule to this case, and we affirm the district court's finding that Great Lakes did not meet its burden under that rule.[14]

**B.** *Exclusion of Commander Cavallero's Deposition*

Great Lakes challenges the failure of the district court to admit into evidence at least portions of a deposition taken by the parties of Coast Guard Commander Samuel Cavallero. Commander Cavallero was the investigating officer who prepared the formal Coast Guard report on the collision. *See supra* at 644-45, at ___-___. The report, although not its conclusions, were admitted; the trial judge refused to admit the deposition.

---

[14] Great Lakes also argues that the presumptions of *The Pennsylvania* rule should not be applied in the face of the seemingly conflicting presumptions found in *The Oregon*, 158 U.S. 186, 15 S.Ct. 804, 39 L.Ed. 943 (1895), which held that when a moving vessel strikes an anchored one a presumption of negligence on the part of the moving vessel arises. We do not see these presumptions as conflicting—together they only suggest that both Great Lakes and Chevron are presumptively liable (Great Lakes for its rule violation and Chevron because of its status as the moving vessel). In any event, the district court explicitly, and appropriately, weighed the competing presumptions of *The Pennsylvania* and *The Oregeon* cases in determining the proportionate fault of the two vessels in question. *See Complaint of Chevron Transport Corporation*, 613 F.Supp. at 1436.

In a footnote in its brief, Great Lakes also argues that *The Pennsylvania* rule may conflict with the general burdens of persuasion set out in Fed.R.Evid. 301. We reject the suggestion that the Federal Rules of Evidence altered *The Pennsylvania* rule. We agree with the Fifth Circuit that the adoption of the federal rules did not modify the substantive burdens and presumptions long established in federal admiralty law. *See James v. River Parishes Co.*, 686 F.2d 1129, 1133 (5th Cir. 1982).

When Great Lakes attempted to have the deposition read into evidence, Chevron objected and argued that the deposition was "all hearsay." The trial judge decided to review the deposition overnight. *See* Record, Vol. 27 at 148-53. The following morning, after reading most of the deposition, the trial judge ruled that the deposition could not, in its entirety, be admitted; he stated that the "great majority of it is hearsay." He did admit all exhibits that were properly identified in the deposition. *See* Record, Vol. 28 at 32. On appeal, Great Lakes argues that the judge committed error by refusing to admit the depositon.

We have reviewed the challenged deposition in its entirety, and agree with the district court's conclusion that most of the deposition is hearsay. On appeal, Great Lakes points to specific small portions of the deposition that would arguably be admissible. Great Lakes, however, did not bring any of these passages to the attention of the district court, and made no requests to admit specific portions. When a document a party seeks to admit is full of inadmissible material, it is incumbent on the party to specifically note the admissible sections. The district court cannot be expected to wade through a 129-page deposition pulling out the handful of admissible exchanges in the document. We affirm the refusal of the district court to admit the deposition in its entirety, and we hold that Great Lakes cannot attempt on appeal to gain the admission of specific passages when Great Lakes did not present those passages to the district court. If any of the passages were vitally important to Great Lakes' defense, as they claim on appeal, they should have raised them to the district court. A district court will almost always be willing to consider specific sections of a document that is not admissible in its entirety.

C. *Great Lakes' Claim for Indemnity*

Great Lakes challenges the district court's order, entered before the trial, granting Chevron's motion for sum-

mary judgment on Great Lakes' claim for indemnity from Chevron. At the time the motion was granted, Great Lakes argued that it might be held liable based only on a technical finding of unseaworthiness, and that in such a case Great Lakes had a right to indemnity from Chevron based on the concepts of active and passive negligence. The district court rejected this argument, and granted Chevron's motion. Great Lakes retained, of course, a right to contribution from Chevron.

In *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493 (5th Cir. 1982), the new Fifth Circuit considered arguments similar to those presented here by Great Lakes. As that court indicated, the active-passive negligence doctrine was a device aimed at easing the burden of the equally-divided-damages rule of *The Schooner Catherine*. As discussed above, however, the Supreme Court rejected that rule in favor of comparative fault in *United States v. Reliable Transfer*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975). The Fifth Circuit noted that it "is difficult to see the need for the active-passive indemnification rule in a comparative fault system." *Loose*, 670 F.2d at 501-02. That court abolished the active-passive negligence rule. We agree with this reasoning, and hold that in an admiralty case where the district judge assesses the relative degrees of fault, there is no place for the active-passive negligence doctrine. A tortfeasor only passively negligent will presumably bear a smaller percentage of the fault for an injury. If, because of other rules and obligations, a passively negligent tortfeasor initially pays more than its share, it can seek contribution from the more active tortfeasor. In the case below, the district court granted partial summary judgment on the issue of indemnity, and left the possibility of contribution available. We affirm the district court on this point.

## IV. CHEVRON'S CLAIMS AGAINST GREAT LAKES

On appeal, Chevron argues that the district court erred by denying its complaint seeking limitation of liability under the 135-year old Limitation of Liability Act, 46 U.S.C. § 183 (1986). According to that act, the

> liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity of knowledge of such owner or owners, shall not .4.4. exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

*Id.* § 183(a). As this court has detailed,

> a determination of whether a shipowner is entitled to limit his liability involves a two-step analysis. . . . "First, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness." Moreover, once a claimant satisfies the initial burden of proving negligence or unseaworthiness, the burden of proof shifts to the shipowner to prove the lack of privity or knowledge.

*Hercules Carrier, Inc. v. Claimant State of Florida*, 768 F.2d 1558, 1563-64 (quoting *Farrell Lines, Inc. v. Jones*, 530 F.2d 7 (5th Cir. 1976)) (other citation omitted).

In the limitation of liability context, the district court's findings about negligence, unseaworthiness, privity, and knowledge are considered on appeal to be factual findings

subject to review under the clearly erroneous standard. *See Hercules Carriers, Inc.*, 768 F.2d at 1565. Chevron argues in this appeal, however, that the district court erred as a matter of law in finding negligence, privity, and knowledge. Because we read the district court's opinion differently than Chevron, and we think Chevron misunderstands the lower court's holding, we affirm the district court's refusal to allow Chevron to limit its liability.

According to Chevron's briefs on appeal, the district court ruled that Chevron was negligent because a critical Notice to Mariners discussing the dredging operation was not on board the Robert Watt Miller at the time of the collision. Chevron points to the district court's statement that "there is no evidence that the notice . . . . ever reached the Robert Watt Miller," 613 F.Supp. at 1437, and argues that the district court impermissibly shifted the burden of proof on the issue of negligence away from Great Lakes and onto Chevron. Chevron argues that while there was no evidence that the notice was on the ship, there also was no evidence that the notice was *not* on the ship. Thus, according to Chevron, Great Lakes did not carry its burden of proof. *See Hercules Carriers, Inc.*, 768 F.2d 1564.

Chevron, however, mischaracterizes the district court's holding. In the district court's opinion, the question of the Notice to Mariners does not form the basis of the negligence proven by Great Lakes, but instead goes to privity, an issue on which Chevron has the burden of proof. The negligence found by the district court is in the fact that Chevron allowed the master of its ship to sail into "unfamiliar waters" "completely unaware" of the dangers that lay in its path. 613 F.Supp. at 1437. Having made this finding of negligence (which is supported by the record), the district court turned to the issue of privity. The burden was then on Chevron to prove that it was unaware of the potential problem. On that issue, the district court looked to adequacy of the distribution system for maritime notices and found it lacking. Because the district court ruled that

Chevron should have been aware of the faults in its information dissemination system, the court ruled that Chevron was not entitled to limit its liability. *Id.* After having reviewed the record, and taking into account the shifting burdens of proof, we cannot say that the district court was clearly erroneous in any of its findings on this point. We thus affirm the denial of Chevron's complaint seeking to limit its liability.[15]

## V. CONCLUSION

For the reasons discussed above, we affirm in part and reverse in part the judgment of the district court, and we remand this case for further proceedings in accordance with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

---

[15] Both the Chevron Transport Corporation, the owner of the Robert Watt Miller, and the Chevron Shipping Company, the managing agent responsible for the operation of the ship, have sought to limit their liability. Because of our affirmance of the district court on this point, we do not reach the question of when, if ever, a managing agent can utilize the Limitation of Liability Act. *See In re Amoco Transport Co.*, 1979 A.M.C. 1017 (N.D.Ill. 1979) (refusing to permit managing agent to limit its liability).

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

---

**No. 85-3673**

---

VIVIAN MARIE SELF, as Administratrix of the estate of DANNY JOE SELF, deceased, etc.,

*Plaintiff-Appellee,*
*Cross-Appellant*

versus

GREAT LAKES DREDGE & DOCK COMPANY, a corporation,

*Defendant, Third Party Plaintiff Appellant, Cross-Appellee,*

and

CHEVRON SHIPPING COMPANY,

*Third Party Defendant, Cross-Appellant.*

GREAT LAKES DREDGE & DOCK COMPANY, a corporation,

*Plaintiff-Appellant, Cross-Appellee,*

versus

CHEVRON SHIPPING COMPANY,

*Defendant-Appellee,*

*Cross-Appellant,*

and

ITALIA SOCIETER PER AZ DI NAV,

*Defendant.*

---

Complaint of CHEVRON TRANSPORT CORPORATION, AS OWNER OF THE S/S ROBERT WATT MILLER, in an action for exoneration from or limitation of liability,

*Plaintiff-Appellee,*
*Cross-Appellant,*

GREAT LAKES DREDGE & DOCK COMPANY, a corporation,

*Claimant-Appellant,*
*Cross-Appellee.*

---

**Appeal from the United States District Court for the MMiddle District of Florida**

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC
(Opinion December 1, 1987, 11 Cir. 198__, ___ F.2d ___ ).

(January 6, 1988)

Before CLARK, EDMONDSON and KEITH*, Circuit Judges.

PER CURIAM:

The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), The Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT.

---

United States Circuit Judge

*Honorable Damon J. Keith, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

| | |
|---|---|
| Complaint of CHEVRON TRANSPORT CORPORATION, as Owner of the SS ROBERT WATT MILLER in an action for exoneration from or limitation of liability | CASE NO. 75-114-CIV-J-M CASE NO. |
| VIVIAN MARIE SELF, as Administratrix of the Estate of Danny Joe Self, deceased, et al., *Plaintiff,* vs. GREAT LAKES DREDGE & DOCK Co., a corporation, *Defendant/Third Party Plaintiff,* vs. CHEVRON SHIPPING COMPANY, *Third Party Defendant.* | 75-126-CIV-J-M |

| | | |
|---|---|---|
| GREAT LAKES DREDGE & DOCK Co., a corporation,<br><br>*Plaintiff,*<br><br>vs.<br><br>CHEVRON SHIPPING COMPANY and ITALIA SOCIETE PER AZ DI NAV.,<br><br>*Defendants.* | * | CASE NO.<br><br>77-635-CIV-J-M |

These consolidated cases were heard by the Court sitting without a jury between January 28 and February 7, 1985. The matter was taken under advisement on April 5, 1985, and after due consideration the Court issues the following opinion:

**BACKGROUND**

On February 5, 1975, the Robert Watt Miller struck the dredge Alaska and barge GL 142 in the Drummond Creek Range Channel of the St. Johns River, Jacksonville, Florida. As a result of the accident, the Alaska, the GL 142 and the Robert Watt Miller sustained damage. A number of crew members on the dredge were injured; two lost their lives.

Each of the death and personal injury claimants instituted separate actions against their employer, Great Lakes Dredge & Dock Co. Great Lakes in turn filed third-party complaints in each action against Chevron Shipping Co., as operator of the Robert Watt Miller. Great Lakes also filed suit against Chevron Shipping Co. and Italia Societe Per Az Di Nav. As owner of the Robert Watt Miller, Chevron Transport Corporation filed a complaint seeking exoneration from or limitation of liability.

Both Chevron Shipping and Chevron Transport settled with all of the personal injury and death claimants. Judge Melton ordered the third-party complaint severed and the case in chief was tried before a jury. The jury heard the case in Jacksonville and returned a verdict in favor of Great Lakes. The Eleventh Circuit reversed that verdict and remanded the case for a new trial. *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 719 (11th Cir. 1982).

Following the *Ebanks* decision this court consolidated all pending actions for a trial to be held beginning January 28, 1985. The only case pending regarding death or personal injury is the case by Vivian Self, as Administratrix of the Estate of Danny Self, (a jury was waived in this

case); Great Lakes settled with the other plaintiffs. In addition, the liability issues only were tried as between Great Lakes and the Chevron companies; damages therefrom will be tried at a later date.

**PARTIES**

Great Lakes Dredge & Dock Co. was the owner and operator of the dredge Alaska and the barge GL 142. The Alaska was a non-self propelled cutterhead dredge 208 feet in length, 46 feet in breadth and 11.8 feet in depth. On February 5, 1975, she was drawing 9 feet forward and 9 feet aft. The GL 142 was a non-self propelled barge 160 feet in length, 52 feet in breadth and 8.6 feet in depth. On February 5, she was drawing 3 feet forward and 3 feet aft. The Alaska's after end was connected to the forward end of the GL 142 by couplings on both the port and starboard sides. On the after end of the GL 142 was a structure consisting of two spuds such that each spud could be lowered or raised to hold the flotilla in position.

Chevron Transport Corporation was the owner of the Robert Watt Miller. The vessel was being operated under a management agreement with Chevron Shipping Company. The Robert Watt Miller was an oil tanker of Liberian registry 625 feet in length, 84 feet in breadth and 44 feet in depth. On February 5, she was drawing 24 feet forward and 28 feet aft.

Danny Joe Self, plaintiff's decedent, was a seaman and member of the crew of the Alaska. On February 5, 1975 he lost his life while engaged in the performance of seaman's duties for his employer, Great Lakes. Vivian Marie Self, the decedent's widow brings her action as Administratirx of the Self Estate and as mother and natural guardian of the couples' children, Deana, age 4 at the time of the accident and Danny, Jr. age 2 at that time.

**STATEMENT OF FACTS**

Great Lakes entered into a contract with the United States Corps of Engineers for the purpose of deepening

the channel leading to the Jacksonville, Florida, harbor. On November 27, 1974, the Coast Guard published a local notice to mariners to give notice to shipping interests that the Alaska would be engaged in dredging operations in the St. Johns River. The operation was a project to dredge the channel to 38 feet. Dredging was begun in the Drummond Creek Range on December 26, 1974.

The Robert Watt Miller came to Jacksonville from Port Everglades, Florida arriving on February 5, 1975, at approximately 7:12 A.M. Pursuant to compulsory pilotage laws, Pilot Henry Steele boarded the Robert Watt Miller in order to take the vessel to the Eastern Seaboard docks to discharge a cargo of oil. Due to restricted visibility in the early morning, Steele waited until 9:48 A.M. to prepare to enter the harbor. After the pilot checked the navigational gear and synchronized the clocks, the anchors were raised at 10:27 A.M.; the Robert Watt Miller then proceeded inbound. At this time the current was ebbing toward the mouth of the river at about 1.5 knots. Visibility was good.

The Robert Watt Miller passed Fulton Cut at 11:29 full ahead. The speed was reduced to half ahead at 11:40 and the vessel passed Blount Island. The speed was reduced to dead slow and stop at 11:43 as the tanker passed Blount Island Terminal. At 11:45 the speed was increased to full ahead.

As the Robert Watt Miller proceeded around Dame Point Turn approaching Broward Point Turn, Captain Steele became aware of the Tug Warrengas ahead. The tug was pushing a loaded barge proceeding upstream. The Robert Watt Miller was put full ahead and passed the Warrengas on the port side.

Knowing the dredge Alaska was in the area Captain Steele called the dredge on VHF radio channel 13. The exact words spoken by Steele and the response of the leverman aboard the dredge are unknown. The conversa-

tion was such that the Robert Watt Miller informed the Alaska that she was a tanker drawing approximately 28 feet and would arrive in the vicinity of the Alaska within 20 minutes. The Alaska responded giving the tanker permission to make a port to port (one whistle) passing. At the time of this conversation neither vessel could see the other because of the obstruction caused by Quarantine Island.

After making his final turns to line up in Drummond Creek Range, Captain Steele, for the first time saw where the dredge was positioned. He concluded that the stern of the dredge's idler barge was encroaching into his side of the channel by 25 feet. Steele reached this conclusion using reference to a church steeple and a notch in some trees. Neither Steele nor the Master checked the Robert Watt Miller's position with respect to the Range marked by the Coast Guard nor was a compass bearing taken on the Alaska. To remedy the perceived problem of the encroachment and to provide ample passing space the pilot set a course close to the north side of the channel.

The leverman onboard the Alaska saw the bow of the Robert Watt Miller at about 12:02. At that time he stopped dredging and swung the dredge to a position such that the starboard bow of the dredge was to the south bank of the channel.

In the vicinity of the Gulf dock, located approximately at buoy #59, the pilot and master of the Robert Watt Miller noticed a decided sheer of the vessel to port. Consequently, an order of 10 degrees right rudder was given. The sheer continued and an order of 20 degrees right rudder was given. The master then initiated an order of hard starboard rudder and full ahead on the engines. That order was given at 12:09 but the sheer continued so a full astern was ordered at 12:11.

Immediately before impact the pilot of the Robert Watt Miller radioed a warning to the Alaska informing the le-

verman to clear the dredge and barge of all personnel. He also blew the warning whistle. At about the same time the operator of the dredge's tender tug Tarheel State, lying on the port side of the Alaska, saw the danger, sounded the tug's whistle and moved out of the path of the Robert Watt Miller.

Between 12:10 and 12:12, the timing having not been exactly established, the bow of the Robert Watt Miller struck the Alaska. The bow first contacted the dredge's port anchor boom, then struck the hull about 100 feet aft of the bow. The impact broke the coupling between the Alaska and the GL 142. The Robert Watt Miller slipped down the side of the Alaska, came into contact with the Barge thus causing her to be loosened from the connections to the dredge. The momentum of the Robert Watt Miller continued forward along the GL 142 and rolled the barge over on her starboard side. The Robert Watt Miller's engines were stopped at 12:13.

When the Barge rolled over several crewmen were injured; two, including the plaintiff's decedent, lost their lives. The plaintiff's decedent, Danny Self, was a deckhand aboard the Alaska. Around noon on February 5, 1975, he and other crew members gathered in the mess hall for lunch. One minute prior to collision one of Self's fellow crewmen went to the door of the mess hall, saw the Robert Watt Miller and yelled out to the others. At this time the men ran from the mess hall aft to the port side to a ladder near the stern. They continued down the ladder to the main deck and across the gangway to the barge. The men had just reached the barge when the impact of the Robert Watt Miller rolled it over. Eleven crew members were cast into the water.

Immediately, rescue attempts were made by the dredge's tender tugs, the survey boat Canaveral and a small fishing boat. In addition, crew members of the Alaska and the

Robert Watt Miller threw life rings and flotation equipment attempting to save the men in the water.

Burke, a crew member of the Alaska, had grabbed his life jacket from the handrail when leaving the mess hall. He attempted to save Self by holding on to him, but the suction and current proved stronger than the grips of Self and Burke. Self was pulled away and lost his life.

**JURISDICTION**

This Court has jurisdiction of the subject matter under 28 U.S.C. §1331, this being an action at law by virtue of Section 20 of the Jones Act, 46 U.S.C. §688, and under 28 U.S.C. §1333. This Court has jurisdiction of all of the parties.

**THE SHEER**

The fact is apparent that the immediate cause of this accident was the sheer to the port encountered by the Robert Watt Miller just west of the Gulf Docks in the Drummond Creek Cut. The causes leading up to this sheer were several, the combination of which contributed to cause the accident.

As the evidence at trial showed, the sheer that developed moments prior to collision was sudden. However, if the navigator did not properly navigate his vessel either before or after the sheer occurred then the unexpected nature of the sheer does not operate so as to exonerate the navigator. *Seaboard Airline R.R. v. Pan American Petroleum & Transport Co.*, 199 F.2d 761, 765-66 (5th Cir. 1952). Further, a sheer by one vessel into another resulting in collision raises a rebuttal presumption of negligence on the part of the sheering vessel. *Atkins v. Lorentzen*, 328 F.2d 66, 68 (5th Cir. 1964). This presumption can be overcome by a showing that the cause of the accident in no way resulted from a failure of due care on the part of the sheering vessel. *Id.* at 69.

Viewing the events prior to and during the sheer of the Robert Watt Miller, the court is convinced that certain acts of negligence by the navigators contributed to the cause of the sheer and consequently the cause of the collision. To begin with, the speed of the tanker through Broward Point Turn heading toward the Alaska was excessive. This excessive speed had a dual effect upon the sheer. First, if the Robert Watt Miller had not been traveling at an excessive speed, the evidence showYed that the sheer probably would not have developed. Secondly, had the navigators been traveling at a prudent speed, sufficient reverse power would have been available to break the sheer if or when it did occur.

In addition to the speed, the court must consider the navigators' failure to use the anchors in an attempt to break the sheer. From the evidence presented at trial, it is clear that the ship's anchors, or at least the starboard one, could have been helpful in breaking the sheer or at least reducing the impact of the collision.

Finally, there remains the question of where the ship was being conned with respect to the proximity of the northern bank of the channel. Pilot Steele placed the tanker far to her starboard (northern bank) because of his perception of the position of the Alaska. Evidence at trial indicated that the range used by Steele tended to direct the vessel well over toward he right hand (northern) side of the channel, which was a causal factor in the sheer and ultimately the collision.

In view of the preceding, it is clear that the navigation of the Robert Watt Miller both before and during the sheer contributed in causing and/or amplifying the effect of the sheer. Hence, the presumption of negligence attributed to the sheering vessel has not been successfully rebutted.

## NEGLIGENCE OF THE MASTER OF THE ROBERT WATT MILLER

At all material times the Robert Watt Miller was under the command of Captain Mario Stillitano, an Italian national. From the time the tanker's anchors were raised on the morning of February 5, 1975, until the time of the collision, Captain Stillitano was on the bridge observing the navigation of the vessel. During the inbound voyage the matter delegated to compulsory pilot Henry Steele the duty of giving orders to the helmsman and to the engine room.[1]

Since the navigators of the Robert Watt Miller included both Captain Stillitano and the compulsory pilot, Captain Steele, the court must consider several factors. As a threshold consideration the court notes that when a vessel is being operated by a compulsory pilot, the vessel is liable in rem only; the owner has no *in personam* liability unless there is some personal involvement or negligence that can be attributed to the master or crew. *The China*, 74 U.S. (7 Wall.) 53 (1868). However, the exemption from *in personam* liability applies only "where the pilot is actually in charge of the vessel, and solely in fault." Id. at 64. The China also holds that the party claiming the exemption has the burden of proving "the pilot was in fault, and that there was no fault on the part of the officers or crew, 'which might have been in any degree conducive to the damage.' "[2]

---

[1] The master and all licensed officers on the Robert Watt Miller were Italians and the unlicensed crew were all Indians. Although there was some language barriers between the officers and crew they were sufficiently versed in English as related to nautical and navigational terminology that communications presented no difficulties. The Court is convinced that the crew performed as ordered and there there were no miscommunications between the officers and crew which could have been a contributing cause to this casualty.

[2] The court is aware of those cases which require the master to take

In the collision that occurred in this matter, the pilot was negligent; however, the master of the Robert Watt Miller was also guilty of negligence. The evidence indicates that Captain Stillitano was not even aware of the presence of the Alaska dredging in Drummond Creek Range until minutes prior to the collision. This is true in spite of a notice to mariners published by the Coast Guard on November 27, 1974. A reasonable shipmaster preparing to enter an unfamiliar channel would in the exercise of due care review the notices to mariners and ascertain from the pilot other information about extraordinary situations. The master's failure to avail himself to this information prevented him from skillfully supervising the pilot's conning of the ship in this situation. This negligence in turn led to the chain of events that caused the collision.

Further evidence of negligence by the master is seen in his failure to determine the precise location of his ship with respect to the Alaska and the available channel. The dredge was positioned at an angle which made it difficult for the navigators to determine the exact location of the flotilla, consequently the pilot set a course too far to the right bank. Captain Stillitano should have used due care and checked the position of the Alaska and GL 142 with respect to the position of the Robert Watt Miller by use of recognized and available navigational equipment instead of depending on Pilot Steele's use of bearings on antiquated land fixtures. This negligence was a contributing cause of this collision. Even though it is acceptably sound practice for a captain to rely on the judgment of a compulsory pilot, there come times which not only justify but require the captain in fulfilling his duty to supervise the

---

charge of the vessel only when the pilot is incompetent or incapacitated. *See, e.g., Union Co. v. United States*, 127 F.2d 771 (5th Cir. 1942); *Charente Co. v. United States*, 12 F.2d 412 (5th Cir. 1926); *City of Canton*, 6 F.2d 6 (5th Cir. 1925). However, the present case does not reach that issue, but instead focuses on the requirement of *The China* that the master must be personally free from negligence.

pilot's conning of the vessel to question the soundness of this judgment.

Chevron has failed to establish that the faults of the master were not "conducive to the damage" in this matter. As a result, *in personam* liability lies against those in charge of the Robert Watt Miller.

## THE POSITION OF THE ALASKA/GL 142

Prior to the commencement of dredging operations Great Lakes' project engineer, Martin Snow, established a "digging range" using conventional civil engineering land surveying techniques. The digging range was parallel to and fifty feet to the southeast of the Drummond Creek navigation range established by the Coast Guard. To mark this digging range a laser beam was used. The dredge and barge could be positioned with its longitudinal centerline 50 feet south of the centerline of the channel by putting the vessel's head gyro on the channel range and then standing on the centerline of the vessel looking aft to locate the laser beam and shifting the dredge to place the beam midship of the dredge. The horizontal dispersion of the laser beam was four inches per mile.

Great Lakes checked the operation of the laser transmitter at least daily. On the morning in question the position of the dredge was checked with respect to the laser beam sometime between 10:00 and 11:00 A.M. The court is convinced that the equipment was in place, in order and functioning as it was intended at all material times.

At trial a dispute arose concerning the location of the dredge with respect to the centerline of the channel, that is, whether the dredge was properly aligned on the laser beam. It was uncontroverted that once the Alaska's leverman saw the Robert Watt Miller come into the dredge's vicinity, he discontinued dredging and swung the bow of the Alaska to her starboard bank out of the channel. Neither party presented convincing evidence as to the position

of the port quarter of the barge in relation to the centerline of the channel. However, it was established that the swing of the Alaska placed the dredge and barge at an angle occupying the descending half of the channel.

The Pilot Rules for Inland Waters, 33 C.F.R. §80.26(b) in force at the time in question, required a dredge to "straighten out" within the cut after giving an approaching vessel the signal that the channel is clear. Clearly, the Alaska and GL 142, lying at an angle, violated this provision. When a statutory provision is violated *The Pennsylvania* rule is applicable. *The Pennsylvania* rule shifts the burden of proof to the violator of a statutory rule intended to prevent collisions to show "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been [a cause of the collision]." *The Pennsylvania*, 86 U.S. (19 Wall) 125, 136 (1873). The rule is not one of liability but shifts the burden of proof as to the causation. *Orange Beach Water, Sewer and Fire Protection Authority v. M/V Alva*, 680 F.2d 1374, 1381 (11th Cir. 1982); *Garner v. Cities Service Tankers Corp.*, 456 F.2d 476, 480 (5th Cir. 1972). In determining the boundaries of the rule, the former Fifth Circuit held that the rule was not meant to require every vessel guilty of a statutory fault to prove that "its fault could not by any stretch of the imagination have any causal relation to the collision, no matter how speculative, improbable, or remote." *Compania De Maderas De Caibarien v. The Queenston Heights*, 220 F.2d 120, 122 (5th Cir. 1955).

The angle at which the Alaska and GL 142 was positioned in the Drummond Creek Cut distorted the perception of the navigators of the Robert Watt Miller as the tanker came around Broward Point Turn. Regardless of whether the navigators used Pilot Steele's method of locating the range or the established ranges the position of the dredge and barge caused problems in the determination of a prudent course to set to safely pass the flotilla.

In so stating, the court does not retract its previous holding that the pilot used a faulty range and that he and the master were negligent in failing to use recognized and available navigational equipment to determine the relative positions of the entities involved. Instead, this court holds that the angle at which the Alaska and GL 142 was positioned coupled with the flotilla's location on the St. John's River was a contributing cause of this accident. Hence, Great Lakes has not met its burden under *The Pennsylvania* rule even as by *Queenston Heights*, supra, standards of showing that the violation of the statutory rule could not have been a cause of the accident.

A related and very serious consideration concerns the fact that the dredge possessed the status of an anchored vessel while the Robert Watt Miller was a moving vessel. *See Al Johnson Construction Co. v. S.S. Rio Orinoco*, 249 F.Supp. 182, 189 (E.C. Pa. 1965). When a moving vessel strikes an anchored one a presumption of negligence arises on the part of the vessel in motion. *The Oregon*, 158 U.S. 186 (1895); *The Victor*, 153 F.2d 200 (5th Cir. 1946). The moving vessel is solely liable unless she can prove that the accident was caused by the fault of the anchored vessel or that the accident was inevitable. *McCready v. Goldsmith*, 59 U.S. (18 How.) 89 (1856). In the instant matter fault has been established on the part of the dredge by operation of *The Pennsylvania* rule. Thus, the court will weigh the 001600 presumption of *The Pennsylvania* and that of *The Oregon* in determining proportionate fault of the two vessels in question.

## EXONERATION FROM/LIMITATION OF LIABILITY

Chevron Transport, the owner of the Robert Watt Miller, has filed a complaint seeking to limit its liability to the value of its interest in the vessel pursuant to 46 U.S.C. §183. In order to determine if a shipowner is entitled to limit its liability, the court must first determine what acts of negligence or conditions of unseaworthiness caused the

accident and secondly whether the shipowner had privity or knowledge of same. *Farrell Lines Inc. v. Jones*, 530 F.2d 7, 10 (5th Cir. 1976). The initial burden of proving negligence or unseaworthiness rests with the libellants; the petitioner in limitation has the burden of proving lack of privity or knowledge. *Coleman v. Jahncke Service, Inc.*, 341 F.2d 956, 958 (5th Cir. 1965.)

As the foregoing discussion illustrates the first part of the test has been met. That is, Great Lakes has proven that Chevron committed various acts of negligence which proximately caused or contributed to the casualty involved here. The weight of the evidence has shown that Chevron allowed its ship, the Robert Watt Miller, to proceed into unfamiliar waters without using ascertainable information to see that the ship's voyage was carried out in a prudent manner. A primary cause of the collision was the fact that the master could not shoulder his duty of due care in the navigation of the Robert Watt Miller because he was completely unaware of dredging operations on the St. Johns River, thus, could not intelligently oversee the ship's inbound voyage. Aware of this fact the court now moves to the question of privity and knowledge; cognizant of the fact that Chevron has the burden of proving lack of privity or knowledge.

As a preliminary matter the court notes that Chevron Transport delegated the duty of operational management of the Robert Watt Miller to Chevron Shipping. In a corporate owner situation privity and knowledge of those to whom management is delegated is also privity and knowledge of the corporation owner. 341 F.2d at 948. Since the present case involves a corporate owned ocean vessel, the question of privity and knowledge is focused on whether the shore based management is aware of or should have been aware of the likelihood of the occurrence happening after the ship is underway. *Tittle v. Aldacosta*, 544 F.2d 752, 756 (5th Cir. 1977); *Avera v. Florida Towing Corp.*, 322 F.2d 155 (5th Cir. 1963).

Chevron Shipping undertook the responsibility of distributing to its vessels the applicable notices to mariners. However, the distribution system used was far from adequate and there is no evidence that the notice concerning dredging operations in the St. Johns River channel ever reached the Robert Watt Miller. Chevron Shipping's port superintendent testified that he had been aware that a dredge was working in the channel he would have ordered tugs to escort the tanker past the dredging operations to its intended berth. Obviously, management personnel at Chevron Shipping should have been aware of the likelihood of an accident. Due to their failure to disseminate this information to those who Chevron had entrusted to navigate their vessels and because Chevron Transport had knowledge of this situation through its corporate manager, Chevron Shipping, it is not entitled to limit its liability. Limitation of liability must be denied.

**THE DANNY SELF CLAIM**

Danny Self, as a deckhand assigned to work on the dredge Alaska, was a seaman within the meaning of the Jones Act, 46 U.S.C. §688. In bringing a death action on her husband's behalf, Mrs. Self asserts that Great Lakes was negligent in failing to drill the crew, in failing to provide life-saving/rescue skiffs and in failing to provide Danny Self with a life jacket and instructions regarding its use.

As a part of its contract with the government to dredge Drummond Creek Range, Great Lakes undertook to abide by the provisions of the Corps of Engineers safety Manual No. EM 385-1-1. Among the provisions of the Manual was one requiring abandon ship drills, fire drills and man overboard or rescue drills. The evidence at trial clearly indicated that Great Lakes had not complied with such requirements.

Another provision of the Safety Manual required life-saving or safety skills be provided that were ready for

launching, with men trained in the launching. This provision further provided that the skiffs be used only for emergencies and lifesaving drills. Great Lakes did not convince the court that this provision had been complied with or that an approved substitute had been allowed by the Corps.

A claim under the Jones Act requires a finding both of a negligent breach of duty and proximate cause. *Myles v. Quinn Menhaden Fisheries, Inc.*, 302 F.2d 146, 150 (5th Cir. 1962). The causative element in Jones Act cases is less than the common law standard of proximate cause. *Reyes v. Vantage S.S. Co., Inc.*, 609 F.2d 140, 146 (5th Cir. 1980). The question of proximate cause thereunder focuses upon whether the actions of the defendant contributed to the injury even in the slightest degree. *Sanford Brothers Boats, Inc. v. Vidrine*, 412 F.2d 958, 966 (5th Cir. 1969). In addition, the employer's negligence need not be the sole proximate cause of an injury to result in liability but need merely be a contributing cause of the accident. *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 221 (5th Cir. 1975).

In the instant matter the court concludes that the negligent acts of Chevron and Great Lakes were contributing causes in the accident that led to the death of Danny Self. Therefore, the Self interests have met their burden of proving their Jones Act claim. Thus, the court now moves to the issue of recoverable damages.

To begin with, it is necessary to consider certain factors in reaching the award for damages sustained. At the time of his death, Danny Self, age 22, was earning $4.49 per hour on the Alaska. A reasonable assumption is that Mr. Self would have worked 2,080 hours (52 forty-hour work weeks) per year in order to provide for his family. His work upon the dredge would encompass 1,290 hours (32.25 forty-hour work weeks) in one year. Since the loss suffered by Mrs. Self and her children is the loss of income Mr.

Self would have provided, in addition to the 1290 hours per year working on the dredge, the court assumes Mr. Self would also work 790 hours per year (19.75 forty hour work weeks) at a job earning minimum wage. [1,290 hours + 790 hours 2,080 hours or 52 forty-hour work weeks.]

To reach a just award, the salary amount decedent was receiving as a deckhand must be adjusted to reflect the fact that the decedent would have received salary increases and promotions throughout his working life. *See generally, Deakle v. John F. Graham & Sons*, 756 F.2d 821 (11th Cir. 1985). In making various adjustments and assumptions associated therewith, the court has duly considered the testimony of the two economists produced at trial. Accordingly, the court concludes that decedent would have received salary increases of 7.33% per year and that he would have advanced to the level of mate in 1985 and promoted to leverman in 1995 where he would remain until retirement at age 65.

In addition, the court adjusts the decedent's salary at the time of the accident to reflect the loss of fringe benefits such as pension benefits, health insurance, etc. The court determines the rate of fringe benefits relative to pay is 21.58%. The court further determines that approximately 88% of decedent's pay per year would be straight time and 12% overtime.

The award for damages to Mrs. Self and the two children must also include their loss of household services that Mr. Self would have performed. This loss is computed from the time of the accident through decedent's projected life expectancy by estimating the time spent and the value of those services. In addition, the calculation of damages includes a determination of loss of estate or net estate accumulation. On the other side, the court further adjusts the award to reflect the fact that Mr. Self would consume certain funds to maintain his own personal needs. In determining this amount, the court assumes Self consumed

32% of the family income from 1975 to 1985; 27% from 1985 until 1993 and 34% from 1993 through decedent's life expectancy. This percentage changed due to the ages of the children; that is, after the last child left home, presumably at age 21, Mr. Self would consume more personally.

Therefore, the loss sustained by Mrs. Self and her two children includes: lost of income support, loss of fringe benefits, loss of estate and loss of household services. Consequently, the court concludes that the present day value of the pecuniary loss suffered by Mrs. Self is $414,396.00. Each of the two children would receive support until age 21; thus, the present day value of the pecuniary loss suffered by Deana Self is $68,819.00 and $78,139.00 for Danny Self, Jr.

The above figures are reached from evaluation of the testimony of the two economists who testified at trial.

Apart from the pecuniary loss the court concludes that the decedent's wife and children suffered certain nonpecuniary losses. That is, the loss of society, love, affection, companionship, guidance and counsel. The court determines this loss to be $70,000.00 to Mrs. Self, $15,000.00 to Deana Self and $15,000.00 to Danny Self, Jr.

## APPORTIONMENT OF FAULTY

Finally, the court must determine the apportionment of fault between the two parties responsible for the collision. *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975); *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493 (5th Cir. 1982). The court concludes that 70% of the fault is apportioned to Chevron and 30% of the fault is apportioned to Great Lakes.

As the apportionment of fault illustrates, this case involved joint tort feasors, namely, Great Lakes and Chevron. Since Chevron has settled with the Selfs in this case the question of the amount of plaintiff's recovery arises.

The court is of the opinion that the present case is governed by the principles set forth in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979). *See Gormly v. Van Ingen*, 736 F.2d 624 (11th Cir. 1983) (per curiam affirmance applying *Leger*).[3]

In *Leger* an employee was injured while working aboard a barge. He sued three separate defendants but settled with two of the defendants prior to trial. At trial the jury apportioned fault among the defendants and found contributory negligence by the plaintiff. The Fifth Circuit affirmed the trial court's rendering judgment against the nonsettling defendant to pay only the portion of the total damages proportionate to his percentage of negligence. In reaching this opinion Judge Fay stated: "Whether the plaintiff obtains a favorable or unfavorable settlement, he may only recover once for each wrongdoer's percentage of fault." *Id.* at 1250. He further stated that "[i]f a party decides to try a case, it must be prepared to accept whatever benefits or burdens flow from its decision." *Id.* at 1251.

In the present case the court has assessed the plaintiff's total damages at $661,354.00. Since the plaintiff has settled with and released Chevron but has a viable claim against Great Lakes, then the plaintiff is entitled to recover that portion oNYf the total damages proportionate to Great Lakes' percentage of fault or $198,406.20. [30% of $661,354.00].

A Judgment will be forthwith entered in accordance with the above opinion as to the Danny Self claim.

---

[3] In *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982), the court held that *Leger* was inapplicable "because the settling party, Chevron, was not a member of this suit." However, it seems that the converse of that statement would be true here since Chevron was represented at the second trial.

DONE this the 12th day of July 1985.

UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

| | | |
|---|---|---|
| Complaint of CHEVRON TRANSPORT CORPORATION, as Owner of the SS ROBERT WATT MILLER in an action for exoneration from or limitation of liability | * | CASE NO. 75-114-CIV-J-M |
| | * | CASE NO. |
| VIVIAN MARIE SELF, as Administratrix of the Estate of Danny Joe Self, deceased, et al., | * | |
| *Plaintiff,* | * | |
| vs. | * | 75-126-CIV-J-M |
| GREAT LAKES DREDGE & DOCK CO., a corporation, | * | |
| *Defendant/Third Party Plaintiff,* | * | |
| vs. | * | |
| CHEVRON SHIPPING COMPANY, | * | |
| *Third Party Defendant.* | * | |

| | | |
|---|---|---|
| GREAT LAKES DREDGE & DOCK CO., a corporation, | * | |
| *Plaintiff,* | * | |
| vs. | * | CASE NO. 77-635-CIV-J-M |
| CHEVRON SHIPPING COMPANY and ITALIA SOCIETE PER AZ DI NAV., | * | |
| *Defendants.* | * | |

**ORDER**

This matter comes before the Court on two separate motions filed on July 25, 1985. Chevron has filed a Motion for Amendment of Opinion or for New Trial and Great Lakes has filed a Motion to Alter or Amend Judgment. The Court has carefully considered the respective motions and has reviewed its opinion rendered in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that Chevron's Motion for Amendment of Opinion or for New Trial is hereby DENIED. If it FURTHER ORDERED that Great Lakes' Motion for Amendment of Judgment is GRANTED IN PART such that the Court modifies its opinion of July 12, 1985, as follows: The words ". . . the dredge came into sight" on lines 20 and 21 of page 18 should be deleted and the words, "he heard the pilot call the dredge by radio about twenty minutes prior to collision" should be inserted in lieu thereof. The remainder of Great Lakes' motion is DENIED.

DONE this 7th day of August, 1985.

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
MAY 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1695

In The

# Supreme Court of the United States

October Term, 1987

GREAT LAKES DREDGE & DOCK COMPANY,

*Petitioner,*

vs.

CHEVRON TRANSPORT CORPORATION
CHEVRON SHIPPING COMPANY, and
VIVIAN MARIE SELF, ETC.,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## RESPONDENT'S CHEVRON TRANSPORT CORPORATION, AND CHEVRON SHIPPING COMPANY'S BRIEF IN OPPOSITION

G. MORTON GOOD
ROBERT C. SHEARMAN
KELLEY DRYE & WARREN
*including*
SMATHERS & THOMPSON
100 Chopin Plaza
Suite 2400
Miami, Florida 33131
Telephone (305) 372-2400
by G. MORTON GOOD
*Counsel of Record for Respondent*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

# TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE ..... 2

REASONS FOR DENYING THE WRIT ..... 5

CONCLUSION ..... 15

# TABLE OF AUTHORITIES

Page

CASES:

*Aetna Life Insurance Company of Hartford Connecticut v. Haworth*, 300 U.S. 227 (1937) .....6, 10

*Alejandrino v. Quezon*, 271 U.S. 528 (1926).....6

*Alter Barge Line Inc. v. TPC Transportation Co.*, 801 F.2d 1026 (8th Cir. 1986).....12

*Amalgamated Ass'n Etc. v. Wisconsin Employ. Rel. Bd.*, 340 U.S. 416 (1951).....6, 10

*American Book Company v. Kansas*, 193 U.S. 49 (1904).....6, 9

*American Wood Paper Co. v. Heft*, 75 U.S. (8 Wall.) 378 (1869) .....6

*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).....10

*Atkins v. Lorentzen*, 328 F.2d 66 (5th Cir. 1964) .....3, 10, 11

*The Bellhaven*, 72 F.2d 206 (2d Cir. 1934) .....12

*Berenyi v. Immigration Director*, 385 U.S. 630 (1967).....7

*Bernent Towboat Company v. USS Chandler (DDG 996)*, 666 F. Supp. 1454 (D. Or. 1987).....10

*Berry v. Davis*, 242 U.S. 468 (1917).....6

*Branti v. Finkel*, 445 U.S. 507 (1980).....7

*Brownlow v. Schwartz*, 261 U.S. 216 (1923).....6

*Candies Towing Company, Inc. v. M/V B & C Eserman*, 673 F.2d 91 (5th Cir. 1982).....11

TABLE OF AUTHORITIES–Continued

Page

*Capt'n Mark v. Sea Fever Corp.*, 692 F.2d 163 (1st Cir. 1982) ..... 12

*Chamberlain v. Cleveland*, 66 U.S. (1 Black) 93 (1862) ..... 6

*China Union Lines v. A.O. Anderson Co.*, 364 F.2d 769 (5th Cir. 1966), *cert. denied* 386 U.S. 933 ..... 13

*The Choctaw*, 129 F.2d 618 (2d Cir. 1942) ..... 8, 12

*Codlin v. Kohlhausen*, 181 U.S. 151 (1901) ..... 6

*Compania de Madera de Caibarien v. The Queenston Heights*, 220 F.2d 120 (5th Cir. 1955) *cert. denied* 350 U.S. 824 (1955) ..... 4, 8, 13

*Crown Zellerbach Corp. v. Wilamette-Western Corp.*, 519 F.2d 1327 (9th Cir. 1975) ..... 10

*First National Bank of Chicago v. Material Services Corp.*, 597 F.2d 1110 (7th Cir. 1979) ... 12, 13

*Florida East Coast Ry. Co. v. Revilo Corp.*, 637 F.2d 1060 (5th Cir. 1981) ..... 12

*Garner v. Cities Service Lake Corp.*, 456 F.2d 476 (5th Cir. 1922) ..... 4

*Gordon v. United States*, 117 U.S. 697 (1864) ..... 6

*Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271 (1949) ..... 7

*The Great Republic*, 90 U.S. (23 Wall.) 20 (1874) .... 12

*Guidry v. LeBeouf Bros. Towing Co. Inc.*, 398 F.Supp. 952 (E.D. La. 1975) ..... 14

*In re Gypsum Carrier*, 465 F.Supp. 1050 (S.D. Ga. 1979) ..... 13

TABLE OF AUTHORITIES–Continued

Page

*Hayburns' case*, 2 U.S. (2 Dall) 436 (1792).....7

*Heitmuller v. Stokes*, 256 U.S. 359 (1921).....6

*Hellenic Lines Ltd. v. Prudential Lines Inc.*, 813 F.2d 634 (4th Cir. 1987) .....12

*Little v. Bowers*, 134 U.S. 547 (1890) .....6

*Lord v. Veazie*, 49 U.S. (8 How.) 1067 (1850).....6

*Massachusetts v. Mellon*, 262 U.S. 447 (1923).....10

*Mills v. Green*, 159 U.S. 651 (1895)..... 6, 9

*Muskrat v. United States*, 219 U.S. 346 (1911).....7

*National Bulk Carriers v. United States*, 183 F.2d 405 (2d Cir. 1950) *cert. denied*, 340 U.S. 865 (1950) .....8

*National Collegiate Athletic Assocation v. Board of Regent of the University of Oklahoma*, 468 U.S. 85 (1984) .....7

*Nehus v. Alaska Marine Towing Inc.*, 519 F. Supp. 328 (W.D. Wash. 1981) .....10

*New York v. Illinois*, 274 U.S. 488 (1927) .....10

*North Carolina v. Rice*, 404 U.S. 187 (1971) .....6

*Orange Beach Water, Sewer & Fire Protection Authority v. M/V Alva*, 680 F.2d 1374 (11th Cir. 1982).....4, 11

*The Oregon*, 158 U.S. 186 (1895)..... 3, 10, 11

*Pacific Tow Boat Co. v. States Marine Corp. of Delaware*, 276 F.2d 745 (9th Cir. 1960) .....14

TABLE OF AUTHORITIES–Continued

Page

*People of the State of California v. San Pablo and T.R. Company*, 149 U.S. 308 (1893) ..... 6

*Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) ..... 6

*The Steamship Pennsylvania v. Troop*, 86 U.S. 125 (1874) ..... 4, 5

*San Mateco Co. v. Southern Pac. R. Co.*, 116 U.S. 138 (1885) ..... 6

*The Schooner Catherine*, 58 U.S. (17 How.) 170 (1885) ..... 9, 12

*Seaboard Tug and Barge Inc. v. Rederi AB/Disa*, 213 F.2d 772 (1st Cir. 1954) ..... 8, 12, 14

*Self Towing, Inc. v. Brown Marine Services, Inc.*, 837 F.2d 1501 (11th Cir. 1988) ..... 11

*Singer Manufacturing Company v. Wright*, 141 U.S. 696 (1891) ..... 6, 10

*Socony-Vacuum Oil Co. v. Smith*, 179 F.2d 672 (5th Cir. 1950) ..... 12

*South Spring Gold Co. v. Amador Gold Co.*, 145 U.S. 300 (1892) ..... 9

*State of Kansas v. Burelson*, 250 U.S. 188 (1919) ..... 6

*Tempest v. United States*, 404 F.2d 870 (4th Cir. 1968) ..... 8, 12

*Texas v. Interstate Commerce Commission*, 258 U.S. 158 (1922) ..... 10

*The Umbria*, 166 U.S. 404 (1897) ..... 13

*United State v. Alaska S.S. Co.*, 253 U.S. 113 (1920) ..... 6

TABLE OF AUTHORITIES–Continued

Page

*United States v. Ceccolini*, 435 U.S. 268 (1978) .....7

*United States v. Doe*, 465 U.S. 605 (1984) .....7

*United States v. Ferreira*, 54 U.S. (13 How.) 42 (1851).....7

*United States v. Hamburg American Line*, 239 U.S. 446 (1916).....6

*United States v. Reliable Transfer, Co.*, 421 U.S. 397 (1975) .....4, 5, 8, 9, 12, 13

*United States v. West Virginia*, 295 U.S. 463 (1934).....10

*Willing v. Chicago Auditorium Association*, 277 U.S. 274 (1928).....6

OTHER:

33 C.F.R. § 80.26 (1974) .....3, 7

In The

# Supreme Court of the United States

October Term, 1987

No. 87-1695

GREAT LAKES DREDGE & DOCK COMPANY,

*Petitioner,*

vs.

CHEVRON TRANSPORT CORPORATION
CHEVRON SHIPPING COMPANY, and
VIVIAN MARIE SELF, ETC.,

*Respondent.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

Respondent Chevron Transport Corporation and Chevron Shipping Company respectfully request that this court deny the Writ of Certiorari, seeking review of the Eleventh Circuit's opinion in this case entered on December 1, 1987.

## STATEMENT OF THE CASE

In 1974 the U.S. Army Corps of Engineers engaged Great Lakes Dredge and Dock Company, owner of the dredge Alaska, to deepen the Jacksonville ship channel in the St. Johns River in Jacksonville Florida. Pursuant to its contract the dredge Alaska undertook dredging activities in the St. Johns River. The stern of the dredge was "spuded" down near the midline of the channel and the dredge pivoted around the spuds with the cutter head sweeping from side to side across the channel. On the morning of February 5, 1975 the inbound tanker Robert Watt Miller, owned by Chevron Transportation Corporation and managed by Chevron Shipping Company arrived in Jacksonville from Port Everglades Florida. The pilot navigating the Robert Watt Miller[1] radioed ahead stating that the tanker would arrive in the Alaska's vicinity in approximately twenty minutes. The dredge responded and gave the tanker permission to pass port to port.

Shortly before noon the Robert Watt Miller rounded the Broward Point turn and proceeded towards the Drummond Creek range and the dredge Alaska. Upon obtaining a visual sighting of the dredge, the Robert Watt Miller set a course close to the north side of the channel to allow sufficient room to pass the dredge. The leverman on the Alaska, seeing the approaching tanker, ceased the dredging activities and swung the bow of the dredge towards the south bank of the channel such that

---

[1] Jacksonville is a compulsory pilotage port. As required, a local pilot had boarded the vessel at the sea bouy for transit up river.

the dredge lay at an angle to the centerline of the channel. The stern remained "spuded" near the centerline. As the Robert Watt Miller proceeded up the north side of the channel a significant sheer to the port developed, drawing the vessel towards the south. Despite the efforts of the Pilot and Captain, the Robert Watt Miller was unable to overcome the sheer, and tragically, collided with the dredge resulting in the death of two crewmembers on the dredge and injuries to several others. All personal injury claimants, with the exception of Self, settled with both Great Lakes and Chevron.

The trial judge found the Robert Watt Miller largely at fault for the collision with the Alaska. In reaching this decision the court applied the rule of *The Oregon*, 158 U.S. 186 (1895) creating a presumption of negligence on the part of a moving vessel which has collided with an anchored vessel. The court also applied the rule found in *Atkins v. Lorentzen*, 328 F.2d 66, 68 (5th Cir. 1964), presuming negligence on the part of a sheering vessel which has collided with another vessel. Unable to overcome these presumptions, the trial court found Chevron and the Robert Watt Miller partially at fault in the collision.

The trial court also found actual fault on the part of Great Lakes for the collision. The positioning of the dredge Alaska was determined to be in violation of 33 C.F.R. § 80.26 (1974) requiring that a dredge, having given an approaching vessel a signal that the channel is clear, shall straighten out within the cut for passage of the vessel. Based on the violation of this federal

regulation the trial court applied the rule of *The Pennsylvania, The Steamship Pennsylvania v. Troop*, 86 U.S. 125 (1874) was construed by the 5th and 11th Circuits.[2] Further, the court found as a matter of fact that the positioning of the dredge in violation of the federal regulation distorted the Robert Watt Miller's perception of the centerline of the channel causing it to proceed too close to the channel's northern edge. This the court held, was a causative factor in the sheer and the resulting collision.

Thereafter, applying the principles laid down in *United States v. Reliable Transfer, Co.*, 421 U.S. 397 (1975), the trial court apportioned fault for the collision 70% to Chevron and the tanker Robert Watt Miller, and 30% to Great Lakes and the dredge Alaska.

All parties appealed the trial court's decision. On appeal, the Eleventh Circuit Court of Appeals reviewed the District Court's decision and affirmed as to its findings of liability and its application of the various presumptions and apportionment of fault.

In the instant petition Great Lakes asks this Court to grant certiorari to determine the continued validity of *The Pennsylvania* rule.

---

[2] *Orange Beach Water, Sewer & Fire Protection Authority v. M/V Alva*, 680 F.2d 1374 (11th Cir. 1982); *Garner v. Cities Service Lake Corp.*, 456 F.2d 476 (5th Cir. 1922); *Compania Madera de Caibarien v. The Queenston Heights*, 220 F.2d 122 (5th Cir. 1955) *cert. denied* 350 U.S. 824.

## REASONS FOR DENYING THE WRIT

1. **In view of the finding below of substantial actual fault on the part of Great Lakes, consideration of the continued validity of the Pennsylvania rule in connection with this action presents a purely academic, moot issue, not properly cognizable by the Court.**

2. **No conflict exists among the circuits concerning the validity of The Pennsylvania rule, and no substantial and important question is presented by the instant petition requiring the attention of this court.**

The rule established by this court in *The Steamship Pennsylvania v. Troop*, 86 U.S. 125 (1874) is presented for review by the petitioner. *The Pennsylvania* rule provides that in the event of a collision, a vessel determined to be in violation of a statutory rule intended to prevent collisions must show "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been [a cause of the collision]." *Id.* at 136. The petitioner characterizes *The Pennsylvania* rule as an inflexible, inequitable relic and asks this Court to discard it as it has discarded other maritime jurisprudential antiques such as the divided damages rule. *United States v. Reliable Transfer*, 421 U.S. 397 (1975).

In determining whether certiorari should be granted it is respectfully submitted that this court should consider a principal of even greater vintage than *The Pennsylvania* rule, requiring that this Court refrain from consideration of purely academic issues, non-essential to the decision in the particular case

before it. *Lord v. Veazie*, 49 U.S. (8 How.) 1067 (1850); *Chamberlain v. Cleveland*, 66 U.S. (1 Black) 93 (1862); *American Wood Paper Co. v. Heft*, 75 U.S. (8 Wall.) 378 (1869); *San Mateco Co. v. Southern Pac. R. Co.*, 116 U.S. 138 (1885); *Gordon v. United States*, 117 U.S. 697 (1864); *Little v. Bowers*, 134 U.S. 547 (1890); *People of the State of California v. San Pablo and T.R. Company*, 149 U.S. 308 (1893); *Mills v. Green*, 159 U.S., 651 (1895); *Codlin v. Kohlhausen*, 181 U.S. 151 (1901); *American Book Company v. Kansas*, 193 U.S. 49 (1904); *Berry v. Davis*, 242 U.S. 468 (1917); *Heitmuller v. Stokes*, 256 U.S. 359 (1921); *Alejandrino v. Quezon*, 271 U.S. 528 (1926); *Willing v. Chicago Auditorium Association*, 277 U.S. 274 (1928); *Aetna Life Insurance Co. of Hartford Conn. v. Haworth*, 300 U.S. 227 (1937); *Amalgamated Assn. v. Wisconsin Employ. Rel. Bd.*, 340 U.S. 416 (1951); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *North Carolina v. Rice*, 404 U.S. 187 (1971).

This case and controversy requirement for exercise of Supreme Court jurisdiction is derived from the Constitution itself; Article III Section 2. Throughout the Court's history this judicial limitation has been strictly adhered to despite frequent attempts to expand the court's jurisdictional base. *See Singer Manufacturing Company v. Wright*, 141 U.S. 696 (1891); *United States v. Hamburg American Line*, 239 U.S. 446 (1916); *State of Kansas v. Burelson*, 250 U.S. 188 (1919); *United States v. Alaska S.S. Co.*, 253 U.S. 113 (1920); *Brownlow v. Schwartz*, 261 U.S. 216 (1923) and cases cited above.

As early as 1793 Chief Justice Jay declined an invitation from then Secretary of State Jefferson to provide the executive with advise regarding "important questions of the construction of treaties, laws of nation and laws of the land, which the secretary said were often presented under circumstances which 'do not give a cognizance of them to the tribunals of the country.' " *Muskrat v. United States*, 219 U.S. 346 (1911) discussing *Hayburns' case,* 2 U.S. (2 Dall) 436 (1792) and *United States v. Ferreira*, 54 U.S. (13 How.) 42 (1851).

The petitioner asks this court to consider and overrule the presumption of causation under *The Pennsylvania* rule in an action in which fault was established, not based solely upon *The Pennsylvania* presumption, but by specific findings of causation and fault. Factual determinations which have been approved by both the District Court and Appellate Court are accorded great weight and, absent extremely unusual circumstances, will not be disturbed by this Court. *National Collegiate Athletic Association v. Board of Regent of the University of Oklahoma*, 468 U.S. 85 (1984); *United States v. Doe*, 465 U.S. 605 (1984); *Branti v. Finkel*, 445 U.S. 507 (1980); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271 (1949); *United States v. Ceccolini*, 435 U.S. 268 (1978); *Berenyi v. Immigration Director*, 385 U.S. 630 (1967).

The district court found, not only that Great Lakes' positioning was in violation of 33 C.F.R. § 80.26 (1974) but that the violation caused a misperception of the channel by the Robert Watt Miller. This misperception forced the tanker to navigate too near the northern bank of the channel resulting in the sheer and collision. Based on this factual determination the court below

found the actions of the dredge to have been a substantial cause (30%) of the collision. This finding of actual substantial fault moots petitioners basis for urging reconsideration of *The Pennsylvania* rule by this court.

Petitioner examines at length criticism regarding *The Pennsylvania* rule in situations in which courts have attempted to ease its burden upon a mariner guilty of a minor or technical statutory violation. *Seaboard Tug and Barge Inc. v. Rederi AB/Disa*, 213 F.2d 772 (1st Cir. 1954); *Tempest v. United States*, 404 F.2d 870 (4th Cir. 1968); *The Choctaw* 129 F.2d 618 (2d Cir. 1942); *National Bulk Carriers v. United States*, 183 F.2d 405 (2d Cir. 1950), *cert. denied*, 340 U.S. 865 (1950); *Compania de Madera de Caibarien v. The Queenston Heights*, 220 F.2d 120 (5th Cir. 1955), *cert denied*, 350 U.S. 824 (1955) (Petition of Great Lakes p. 8).

The Court in this instance, however, is not presented with a minor or mere technical violation of a statutory rule. The positioning of the dredge Alaska was found by the trier of fact to have contributed substantially (30%) to the collision. Where such a significant percentage of liability for a collision has been assigned to the violating vessel, the "judicial buffers" referred to by the petitioner (petition of Great Lakes p. 8) do not come into play. The petitioner seeks to equate the instant action to those predominently pre-*Reliable Transfer*[3] cases involving insignificant statutory violations, where strict application of *The Pennsylvania* rule

---

[3] 421 U.S. 397 (1975). As recognized by the 11th Cir., the harshness of *The Pennsylvania* rule ebbed when combined

(Continued on following page)

would have lead to an inequitable result. Where application of the ameliorative doctrines discussed above is not an issue, however, as it is not in this case, the hypothetical conflicts which might arise from their suggested inconsistent application may not be relied upon as grounds for invoking this courts Certiorari jurisdiction.

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.

*Mills v. Green*, 159 U.S. 651 (1895); *American Book Company v. Kansas*, 193 U.S. 49 (1904).

In order to constitute a "controversy" appropriate for judicial determination, "the controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests . . . admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. *South*

---

(Continued from previous page)

with the pre-*Reliable Transfer* rule of *The Schooner Catherine* 58 U.S. (17 How.) 170 (1885) requiring an equal division of damages. Prior to *Reliable Transfer* a ship that violated a statutory rule but could not overcome *The Pennsylvania* burden would be liable for an equal share of the damages caused by the collision, even though the violation only marginally contributed to the collision.

*Spring Gold Co. v. Amador Gold Co.*, 145 U.S. 300 (1892); *Texas v. Interstate Commerce Commission*, 258 U.S. 158 (1922); *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *New York v. Illinois*, 274 U.S. 488 (1927); *United States v. West Virginia*, 295 U.S. 463 (1934); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936); *Aetna Life Insurance Company of Hartford Connecticut v. Haworth*, 300 U.S. 227 (1937).

The instant action presents no controversy necessitating a determination by this court of the viability of *The Pennsylvania* rule. The specific findings of actual fault made by the trial court and affirmed by the appellate court, eliminate the need for reliance upon the presumption created by *The Pennsylvania* and moot the petitioners basis for challenge of the rule. *Crown Zellerbach Corp. v. Wilamette-Western Corp.*, 519 F.2d 1327 (9th Cir. 1975); *Nehus v. Alaska Marine Towing Inc.*, 519 F. Supp. 328 (W.D. Wash. 1981). *See also Bernent Towboat Company v. USS Chandler* (DDG 996), 666 F. Supp. 1454 (D. Or. 1987).

This court has consistently rejected the invitation to decide issues nonessential to the disposition of the case before it, regardless of the convenience of deciding a question for the governing of future cases. *Singer Manufacturing Company v. Wright*, 141 U.S. 696 (1891). *Amalgamated Ass'n Etc. v. Wisconson Employ. Rel. Bd.* 340 U.S. 416 (1951). Apportionment of fault in the collision was determined by the District Court not only according to *The Pennsylvania* presumption but to presumptions established in *The Oregon*, 158 U.S. 186 (1895), of similar vintage to *The Pennsylvania*, and *Atkins v. Lorentzen*, 328 F.2d 66, 68 (5th Cir. 1964).

Despite the heavy burdens placed by the presumptions of *The Oregon* and *Atkins* decisions on the Robert Watt Miller, sufficient evidence was introduced to rebut a significant portion of liability for the collision, and demonstrate actual fault of 30% on the part of the petitioner, Great Lakes. The trial judge was well aware of the burdens placed on the parties by virtue of the respective presumptions (petitioner's appendix p. 53a). Weighing these presumptions and the evidence introduced, liability was apportioned, not according to any anachronistic formula or antiquated presumption but according to evidence of the actual fault of the parties.

The petitioner requests that this court discard *The Pennsylvania* rule because of its harshness, inflexibility and inconsistent application in certain instances. In view of the District and Circuit court's finding of actual fault, however, these issues are necessarily mooted. As this court has repeatedly done in the past, it should now reject the petitioners invitation to deliberate on an issue non-essential to the disposition of the case before it.

Secondly, the petitioner attempts to portray the various circuits as hopelessly lost in a quagmire of ameliorative doctrines designed to cushion the harsh impact of *The Pennsylvania* rule. In reality, however, there is no conflict among the circuits as to the rule's continued validity, though its applicability to particular factual settings has been rejected. *Orange Beach Water, Sewer and Fire Protection Authority v. M. V. Alva*, 680 F.2d 1374, 1381 (11th Cir. 1982); *Self Towing, Inc. v. Brown Marine Services, Inc.*, 837 F.2d 1501 (11th Cir. 1988); *Candies Towing Company, Inc. v. M/V B & C*

*Eserman*, 673 F.2d 91 (5th Cir. 1982); *Florida East Coast Ry. Co. v. Revilo Corp.*, 637 F.2d 1060 (5th Cir. 1981); *Capt'n Mark v. Sea Fever Corp.*, 692 F.2d 163 (1st Cir. 1982); *Hellenic Lines Ltd. v. Prudential Lines Inc.*, 813 F.2d 634 (4th Cir. 1987); *First National Bank of Chicago v. Material Services Corp.*, 597 F.2d 1110 (7th Cir. 1979); *Alter Barge Line Inc. v. TPC Transportation Co.*, 801 F.2d 1026 (8th Cir. 1986).

The numerous "judicial buffers" recited by the petitioner including the major-minor fault rule, the passive action doctrine, the rule of reasonable probabilities, the last clear chance doctrine, conditions versus causation test, and the interest of judgment and clear fault exceptions, are all portrayed as examples of conflicting or at least inconsistent variations of *The Pennsylvania* rule. (Petition of Great Lakes p. 8-10). They are more appropriately characterized, however, as vehicles for circumvention of the divided damages rule of the *Schooner Catherine*, 58 U.S. (17 How.) 170 (1855) whereby, a vessel guilty of only a minor statutory violation would be forced to bear an inequitable share of the damages caused by the collision, rather than inconsistent application of *The Pennsylvania* rule. *The Great Republic*, 90 U.S. (23 Wall.) 20 (1874); *Tempest v. United States*, 404 F.2d 870 (4th Cir. 1968); *Seaboard Tug and Barge Inc. v. Rederi A/B Disa*, 213 F.2d 772 (1st Cir. 1954); *The Choctaw* 129 F.2d 618 (2d Cir. 1942); *Socony-Vacuum Oil Co. v. Smith*, 179 F.2d 672 (5th Cir. 1950); *The Bellhaven*, 72 F.2d 206 (2d Cir. 1934).

In *Reliable Transfer*, this court, overruling *The Schooner Catherine*, held that liability for damages in a

maritime collision should be allocated among the parties proportionate to the comparative degree of their fault. Since *Reliable Transfer*, the prospect of the inequitable distribution of damages in collision cases has been eliminated along with the divided damages rule.[4] In the post *Reliable Transfer* era, therefore, a vessel violating a statutory provision designed to prevent collisions is assigned only that degree of fault and liability for the collision which actually resulted from the statutory violation. The plethora of ameliorative doctrines cited by the petitioner are simply no longer a concern, and the conflict which they are alleged to have created among the jurisdictions is illusory.

Despite claims by its critics that the rule itself is an inflexible and drastic doctrine, see *In re Gypsum Carrier*, 465 F.Supp. 1050, 613 (S.D. Ga. 1979) *The Pennsylvania* rule has not been applied without moderation. A vessel guilty of a statutory violation has not been required to prove that "its fault could not by any stretch of the imagination have any causal relation to the collision, no matter how speculative, improbable or remote." *The Umbria*, 166 U.S. 404 (1897); *China Union Lines v. A.O. Anderson Co.*, 364 F.2d 769 (5th Cir. 1966), *cert. denied* 386 U.S. 933; *Compania de Madera de Caibarien v. The Queenston Heights*, 220 F.2d 120, 122 (5th Cir. 1955); *First National Bank of Chicago v. Material Service Corp.*, 597 F.2d 1110 (7th Cir.

---

[4] This court's criticism of *The Pennsylvania* rule in *Reliable Transfer* is limited as well to the result obtained when the rule is applied in conjunction with the dividend damages rule. 421 U.S. at 405, 95 S.Ct. 1708.

1979); *Pacific Tow Boat Co. v. States Marine Corp. of Delaware*, 276 F.2d 745 (9th Cir. 1960); *Seaboard Tug and Barge v. Rederi AB/Disa*, 213 F.2d 772 (1st Cir. 1954); *Guidry v. LeBeouf Bros. Towing Co. Inc.*, 398 F.Supp. 952 (E.D. La. 1975).

*The Pennsylvania* rule both in theory and in application performs a valuable function in encouraging safety in maritime navigation. As accurately observed by the Eleventh Circuit "the need to strictly enforce maritime rules is as strong today as it was in 1874, and *The Pennsylvania* decision announced 100 years ago still further[s] that purpose." (petitioner's appendix p. 31a).

## CONCLUSION

As the finding of actual fault on the part of Great Lakes below renders moot considerations regarding the viability and application of *The Pennsylvania* rule to the instant action, there is no conflict among the circuits as to the viability and construction of *The Pennsylvania* rule, and no public policy reason exists for invalidating the rule as it is being construed, there is no basis for the issuance of a Writ of Certiorari by this court to re-examine the rule as urged by the petitioner. The petition should, therefore, be denied.

Respectfully submitted,

G. Morton Good
Robert C. Shearman
Kelley Drye & Warren
*including*
Smathers & Thompson
100 Chopin Plaza
Suite 2400
Miami, Florida 33131
Telphone (305) 372-2400
by G. Morton Good
*Counsel of Record for Respondent*